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## Reliance on Counsel as Reasonable Cause: To the Back Burner after Boyle

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1986]

RELiance ON COUNSEL AS REASONABLE CAUSE: TO THE BACK BURNER AFTER *BOYLE*?

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I. INTRODUCTION

**D**ELINQUENT tax returns invite the imposition of late filing penalties.<sup>1</sup> Executors<sup>2</sup> and others charged with the duty of filing estate tax returns are discovering the high price of tardiness, even if it seemingly occurs through no fault of their own. A major source of difficulty has been the Government’s stringent interpretation of the “reasonable cause”<sup>3</sup> escape hatch for avoiding the penalty on estate tax returns that are filed late. Of particular interest are those instances where the “reasonable cause” claim is based solely on the executor’s reliance upon representa-

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1. See I.R.C. § 6651(a) (1985). This section imposes an “addition to the tax” for unexcused late filings of tax returns. For the text of I.R.C. § 6651(a), see *infra* note 7.

2. The term “executor” is defined in the Internal Revenue Code. See I.R.C. § 2203 (1985). The Code defines “executor” as the executor or administrator of the estate, or, if there is no executor or administrator, then any person in actual or constructive possession of any property of the decedent. *Id.*

3. See *id.* § 6651(a). This section provides in part that a penalty shall not be imposed for a failure to file promptly where “it is shown that such failure is due to reasonable cause and not due to willful neglect.” *Id.*

tions and actions of counsel.<sup>4</sup> The Government has turned a deaf ear to executors making such an argument, and denied their requests for penalty abatements predicated on this theory. Taxpayers pursuing the matter in the courts have encountered assorted reactions. Recently, in *Boyle v. United States*<sup>5</sup> the Supreme Court established a "bright line" test for resolving these cases by adopting the Government's position that reliance on counsel does not constitute reasonable cause for late filing.<sup>6</sup> The Court stopped short, however, of creating an absolute *per se* rule. Consequently, *Boyle* may not destine all future "reliance on counsel" claims to a similar fate. Although the death knell has not been rung, surely a nearly fatal blow has been leveled at executors seeking to avoid delinquency penalties incurred through the inept advice or actions of counsel. The impact of *Boyle* will weigh heavily on counselors and executors alike. The importance of its consequences, and the possible boundaries to which it is confined, warrant scrutiny in order to ascertain whether the Court has prescribed the most appropriate remedy to cure the perceived woe.

## II. BACKDROP

### A. "Addition" to the Tax

Through its turgid language, section 6651(a)(1)<sup>7</sup> imposes an

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4. For the purposes of this article, "counsel" includes attorneys, accountants, agents, or anyone else who is permitted to give advice or is enrolled to practice before the Internal Revenue Service (IRS) under Treasury Dept. Circ. No. 230. See Part 10—Practice Before the Internal Revenue Service, 31 C.F.R. §§ 10.00-10.93(a) (1985). Sections 10.3(a) and (b) specifically authorize attorneys and accountants, respectively, to practice before the IRS merely by declaring current qualification in either profession. *Id.* § 10.3(a)-(b). Section 10.3(c) authorizes those enrolled as agents to practice before the IRS. *Id.* § 10.3(c). Section 10.4(a) intimates that "practice before the IRS" includes the filing of returns, and § 10.22(a) imposes upon those authorized to practice before the IRS a standard of due diligence in the "preparing or assisting in the preparation of, approving and filing returns." *Id.* § 10.22(a) (emphasis supplied).

5. 105 S. Ct. 687 (1985).

6. *Id.* at 693-94.

7. The section provides:

(a) Addition to the tax—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more

addition to the tax shown on the return of five percent of the amount of such tax for each month (or fraction thereof) the return is late. The maximum addition is twenty-five percent regardless of how long after its due date the return is filed.<sup>8</sup> Although not specifically mentioned, estate tax returns are subject to these rules.<sup>9</sup> The current version of this provision is not drastically different from its predecessors, though some changes have occurred.

Penalty provisions, including "additions to the tax," can be traced back to tax statutes of the Civil War era.<sup>10</sup> In the early statutes the addition to the tax for delinquent filing was set at a mandatory fifty percent irrespective of whether the return was one month or one year late.<sup>11</sup> The phase-in to a twenty-five percent maximum in five percent increments did not enter the scene until the mid-1930's.<sup>12</sup> Although the late filing addition to estate taxes was originally segregated from its income tax counterpart,<sup>13</sup> additions to all taxes<sup>14</sup> for late filing were eventually incorporated

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than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate . . . .

I.R.C. § 6651(a)(1) (1985).

8. *Id.*

9. I.R.C. § 6651(a)(1) applies to returns required to be filed under subchapter A of chapter 61 of the Code. *See id.* § 6018, which requires the filing of estate tax returns, is found in subchapter A of chapter 61, thus estate tax returns are within the purview of the penalty section. *See* I.R.C. § 6018 (1980).

10. *See, e.g.*, Act of June 30, 1864, ch. 173, § 14, 13 Stat. 226 (1864). For a historical discussion of the delinquency penalties, *see infra* note 15.

11. *See* Act of June 30, 1864, ch. 173, § 14, 13 Stat. 226 (1864). *See also* Revenue Act of 1916, ch. 451, § 16, 39 Stat. 774 (1916). Section 16 of the Revenue Act of 1916 reads in pertinent part:

In case of any failure to make and file a return or list within the time prescribed by law or by the collector, the commissioner of Internal Revenue shall add to the tax, fifty percentum of its amount except that, when a return is voluntarily and without notice from the collector filed after such time and it is shown that the failure to file it was due to reasonable cause and not to willfull neglect, no such addition shall be made to the tax.

*Id.*

12. *See* Revenue Act of 1935, ch. 829, § 406, 49 Stat. 1027 (1935).

13. Prior to the enactment of the Internal Revenue Code of 1954, the delinquency penalties for income taxes were found in § 291 of the Code, whereas the delinquency penalties for estate and gift tax returns were found in § 3512(d)(1). *See* I.R.C. § 291(s)(1) (1939); *id.* § 3512(d)(1).

14. I.R.C. § 6651(a) applies to all income and transfer tax returns, and to returns for taxes relating to alcohol, tobacco, and firearms. *See* I.R.C. § 6651(a) (1985). However, § 6651(a) does not apply to information returns required by chapter 61, part III. *See id.*; H.R. REP. NO. 1337, 83d Cong., 2d Sess. 418-19, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4025, 4566.

in one section.<sup>15</sup>

Of interesting historical note, all versions of these sections spurn use of the term "penalty," referring to the price to be paid for late filing as an "addition" to the tax. Is a distinction being made? Seemingly not since the "addition" is considered by the drafters to be a penalty. Elsewhere in the section, additions and penalties are equated,<sup>16</sup> and the two are treated as being one and the same. The legal community refers to the "additions" as penalties, and to the "addition" of section 6651(a)(1) more specifically as the "failure to file" or "delinquency" penalty.<sup>17</sup>

Despite its longevity, section 6651(a) has little detailed legislative history. Nowhere is the precise reason for instituting the delinquency penalty stated. The courts, however, have provided some insight. In *Helvering v. Mitchell*,<sup>18</sup> for example, the Supreme Court stated that the purpose of tax penalties is to protect the revenue.<sup>19</sup> Later, in *Spies v. United States*,<sup>20</sup> the Court noted the importance of punctuality to the federal fisc and viewed the penalty provisions as a means of assuring the same in that they induce timely filings of returns and the concomitant receipt of revenue.<sup>21</sup>

15. See I.R.C. § 6651(a) (1985). The separate delinquency provisions were finally brought together into this section in 1954. Act of Aug. 16, 1954, ch. 736, 68A Stat. 821 (1954). See S. REP. NO. 1622, 83d Cong., 2d Sess. 540-41, reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4621, 5240 (§ 6051 is applicable to all taxes for which a taxpayer is required to file a return).

16. See I.R.C. § 6651(b) (1985) ("penalty" imposed on net amount due).

17. See, e.g., Asimow, *Civil Penalties for Inaccurate and Delinquent Returns*, 23 UCLA L. REV. 637, 677 (1976) (analyzing § 6651 under the heading of "Administration of Delinquency Penalty and Judicial Review" and categorizing it as a "failure to file penalty"); Harris & Warner, *Estate Late Filing Penalty Under Section 6651: A New Stricter Interpretation*, 57 TAXES 275, 276 (1979) (labelling § 6651(a)(1) as "Penalty Provision"); Preston, *Reliance on Attorney Defense to Late Filing Penalty Increasingly Being Rejected by Courts*, 9 EST. PLANNING 280 (1982) (characterizing § 6651(a) as provision setting forth lateness penalty).

18. 303 U.S. 391 (1958).

19. *Id.* at 401. The Supreme Court stated:

The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

*Id.* (citations omitted).

The Court has made similar statements in other cases. See, e.g., *U.S. v. Boyle*, 105 S. Ct. 687, 690 (1985) ("Congress' purpose in the prescribed civil penalty was to ensure timely filing of tax returns to the end that tax liability will be ascertained and paid promptly."); *Passavant v. United States*, 148 U.S. 214, 221 (1893) (tax penalty against under-valuation of import merchandise was designed to prevent efforts to escape legal rates of duty).

20. 317 U.S. 492 (1943).

21. *Id.* at 495. The Court stated that "taxpayers' neglect or deceit may prej-

In the same vein the *Boyle* Court stated that "the prompt payment of taxes is imperative to the Government,"<sup>22</sup> and suggested that in a voluntary system rigid adherence to strict filing standards encourages achievement of that objective.<sup>23</sup> The conclusion is clear. The penalties are designed to guarantee the Government prompt receipt of taxes due. Failure to comply with the deadlines will cost the dilatory taxpayer. Presumably, a five percent per month addition is a sufficient incentive to prompt timely returns, but the twenty-five percent cap prevents the charge from being considered confiscatory. This seems a sensible and not overly onerous viewpoint.

Notwithstanding its underlying purpose, however, the addition to tax is not always imposed. Relief is available for those tardy filers who can show that the late filing was the result of "reasonable cause and not due to willful neglect."<sup>24</sup> It is well settled that to avoid the penalty the taxpayer must make a positive showing of reasonable cause and not just prove a lack of willful neglect.<sup>25</sup> More often than not the crucial element of the equation is "reasonable cause," a term not easily reducible to simple defi-

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udice the orderly and punctual administration of the system as well as the revenues themselves." *Id.* Recognizing the congressional objective behind the tax penalties, the Court went on to note that "Congress has imposed a variety of sanctions for the protection of the system and the revenues." *Id.*

22. 105 S. Ct. at 692. For a detailed discussion of the *Boyle* case, see *infra* notes 285-308 and accompanying text.

23. 105 S. Ct. at 692. The Court stated that "the Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of tax simply cannot work on any other basis than one of strict filing standards." *Id.*

24. See I.R.C. § 6651(a) (1985). There is considerable case law refusing to impose penalties on late filers where their filings are the result of "reasonable cause" and not "willful neglect." See, e.g., *Willis v. Commissioner*, 736 F.2d 134 (4th Cir. 1984) (inadvertent error by taxpayer's secretary-comptroller in mislaying tax return and failing to mail it in a timely fashion constituted "reasonable cause"); *Rohrbaugh v. United States*, 611 F.2d 211 (7th Cir. 1979) (in certain circumstances, reliance upon counsel may constitute "reasonable cause"); *Sanderling, Inc. v. Commissioner*, 571 F.2d 174, 178-79 (3d Cir. 1978) (reasonable cause existed where taxpayer filed return after due date because of misinformation by accountant as to actual due date).

25. See, e.g., *Estate of Geraci v. Commissioner*, 502 F.2d 1148, 1149 (6th Cir. 1974) (§ 6651(a) places burden upon taxpayer to prove that failure to timely file federal tax return was "due to reasonable cause and not due to willful neglect"); *Rubber Research, Inc. v. Commissioner*, 422 F.2d 1402, 1407 (8th Cir. 1970) (burden of showing existence of reasonable cause and absence of willful neglect is on taxpayer); *West Virginia Steel Corp. v. Commissioner*, 34 T.C. 851, 860 (1960) (forgetting to file tax returns may not be due to willful neglect but nevertheless does not constitute reasonable cause); *Hornsby v. Commissioner*, 26 B.T.A. 591, 593 (1932) (penalty for tardy filing may only be avoided by showing filing conditions of reasonable cause and not willful neglect).

dition. The Government's view of what constitutes reasonable cause is found in the broad statement: "reasonable cause exists if the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time."<sup>26</sup> This open-ended pronouncement has spawned a variety of bases for establishing reasonable cause for the late filing of estate tax returns.<sup>27</sup> Perhaps the most controversial basis has been the "attorney reliance" theory used by executors to avoid the penalty.

### B. *The Executor's Role*

To fully appreciate the arguments both for and against the "attorney reliance" theory,<sup>28</sup> it will provide valuable to identify the executor's role in the estate tax administration process. Among the responsibilities of an executor is the duty imposed by the Internal Revenue Code to file an estate tax return.<sup>29</sup> The stat-

26. Treas. Reg. § 301.6651(c)(1) (1984).

27. The IRS has announced eight circumstances that may constitute "reasonable cause" for delay in filing. They are: (1) unavoidable postal delays, (2) the timely filing of the correct form with the wrong office, (3) the taxpayer's reliance on erroneous advice of an IRS office or employee, (4) the death or serious illness of the taxpayer or a member of his immediate family, (5) the taxpayer's unavoidable absences, (6) destruction by casualty of the taxpayer's records or place of business, (7) failure of the IRS to furnish the taxpayer with the necessary forms in a timely fashion, and (8) the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit to an IRS office in an attempt to secure information or aid in preparation of a return. INTERNAL REVENUE MANUAL (CCH) § 4350(24), ¶ 22.2-2(2) (Mar. 20, 1980) (Audit Technique Manual for Estate Tax Examiners).

Additionally, taxpayers have succeeded in avoiding the delinquency penalty in other situations. See, e.g., *Philad Co. v. Commissioner*, 47 B.T.A. 565, 570 (1942) (reasonable cause for delay existed where taxpayer's request for extension of time was refused two days after return was due and taxpayer filed return four days after extension was refused); *Alba v. United States*, 81-1 U.S. Tax Cas. (CCH) ¶ 9230 (1980) (reasonable cause found when taxpayer believed in good faith that extension of time granted by Commissioner meant that she did not have to file return or pay tax until she could afford to do so); *E. Comenout, Jr. v. Commissioner*, 51 T.C.M. (P-H) ¶ 82,040 (1982) (reasonable cause found where taxpayer, a Geunault Indian, in good faith believed he was exempt from taxation); *Thelma A. Ramos v. Commissioner*, 55 T.C.M. (P-H) ¶ 55,048 (1955) (reasonable cause found where taxpayer thought that return filed by her former husband was joint return). For a general discussion of reasonable cause under I.R.C. § 6651, see MERTENS, LAW OF FEDERAL INCOME TAXATION § 55.21 (1984); B. BITTKER, FUNDAMENTALS OF FEDERAL INCOME TAXATION § 114.3.2 (1981).

28. For a discussion of the attorney reliance theory, see *infra* notes 43-196 and accompanying text.

29. See I.R.C. § 6018 (1985). Section 6018 provides in pertinent part:

(a) Returns by executor.—

(1) Citizens or residents.—In all cases where the gross estate at the death of a citizen or resident exceeds \$600,000, the executor

utory definition of "executor" is broader than the traditional common law concept<sup>30</sup> to ensure that there is someone obligated to file the return. When required,<sup>31</sup> the return is due nine months from the date of the decedent's death.<sup>32</sup> Failure to file on time will trigger the delinquency penalty.<sup>33</sup> The executor is also charged with the duty to pay the tax.<sup>34</sup> Perhaps it would be better to state that the duty is to see that the tax is paid since the estate tax is not normally considered the personal, individual liability of the executor.<sup>35</sup> Despite the statutory wording, executors are not usually expected to account for a decedent's estate tax liabilities out of their personal funds.<sup>36</sup> The statute provides a way for ex-

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shall make a return with respect to the estate tax imposed by subtitle B.

*Id.* § 6018(a).

30. At common law the term "executor" is used to describe the one named or appointed in the will to carry out the provisions of the will. *See, e.g., In re Silverman's Estate*, 6 Ill. App. 3d 225, 285 N.E.2d 548 (1972); *Lichtenfels v. North Carolina*, 260 N.C. 146, 132 S.E.2d 360 (1963); *In re Watkin's Estate*, 113 Vt. 126, 30 A.2d 305 (1943). The Code, however, takes a broader view of what constitutes an executor for estate tax purposes. *See* I.R.C. § 2203 (1985) (executor may be administrator, or if there is none, any person in actual or constructive possession of any of decedent's property).

31. I.R.C. § 6018 requires an estate tax or its equivalent to be filed when the decedent's gross estate exceeds a specified statutory dollar limit. I.R.C. § 6018 (1985). These limits correspond to the taxable transfer equivalents of the unified credit. *Compare id. with* I.R.C. § 2010 (1984) (united credit against estate tax). The dollar limits currently are \$500,000 for 1986 and \$600,000 for 1987 and thereafter. I.R.C. § 6018(a)(3) (1985).

32. I.R.C. § 6075 (1985). Although estate tax returns are due nine months from the date of the decedent's death, extensions are available upon proper application. *Id.* § 6081. The late filing penalty only applies to returns filed after the expiration of nine months plus any extension period granted. *Id.* § 6651(a).

33. *Id.* § 6651. For the relevant language of § 6651, see *supra* note 7.

34. I.R.C. § 2002 (1985).

35. *See* R. STEPHENS, M. MAXFIELD & S. LIND, *FEDERAL ESTATE AND GIFT TAXATION* § 2002, at ¶ 2.02 (5th ed. 1983). The authors maintain that an executor should incur personal liability only for a fiduciary impropriety with respect to payment of estate tax. *Id.*

36. *Id.* The authors of *Federal Estate and Gift Taxation* assert that it is unacceptable to view the Code as requiring the executor to use his own funds to pay estate taxes "in light of other statutory provisions that fasten personal liability onto the executor [only] in specified circumstances." *Id.*

One such statutory provision may be found in title 31 of the United States Code, which governs money and finance. Section 3713 of title 31 sets out the circumstances dictating priority of Government claims over all others. *See* 31 U.S.C. § 3713 (1982). Regarding the liability of an executor of an estate for noncompliance with the statute, § 3713(b) provides:

A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

*Id.* § 3713(b).



executors to be released from any possibility of personal liability. This is achieved through a request which seeks a prompt audit of the return and release of liability for any tax assessable beyond the liability determined by such an audit.<sup>37</sup> But even absent such a request, executors can generally rest assured that the estate tax liability will be paid from the decedent's assets.<sup>38</sup> Executors must, however, take care when paying debts or making estate distributions because they can become personally liable to the Government if there are insufficient after-debt or post-distribution assets to pay the tax.<sup>39</sup> It would seem that this potential adverse consequence could be easily avoided with a modicum of prudent estate administration. Thus, insofar as estate taxes are concerned, the executor is charged primarily with the duty of seeing

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For a discussion of other provisions fastening personal liability upon an executor in specified circumstances, see R. STEPHENS, M. MAXFIELD & S. LIND, *supra* note 35, § 2204, at ¶ 8.03[1].

37. See I.R.C. § 2204(a) (1985). Section 2204(a) provides:

(a) General rule.—If the executor makes written application to the Secretary for determination of the amount of the tax and discharge from personal liability therefor, the Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount the time for payment of which is extended under section 6161, 6163, or 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

*Id.*

For a discussion of this procedure, see R. STEPHENS, M. MAXFIELD & S. LIND, *supra* note 35, § 2204, at ¶ 8.03[2].

38. See I.R.C. § 2205 (1985). Section 2205 provides:

If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, *it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.*

*Id.* (emphasis added).

39. See *id.* § 3713(b) (1985). For the text of this section, see *supra* note 36. See also Miller, *The Fiduciary's Personal Liability for Deficiencies in Federal Income, Estate and Gift Taxes of a Decedent or Decedent's Estate*, 11 GONZ. L. REV. 431 (1976) (fiduciaries such as executors should be aware that they may incur personal liability for tax obligations of decedent and his estate following settlement and distribution).

that the return is filed and the taxes are paid. Of course, implicit in filing a return is the obligation to ensure it is properly executed. This forces the executor to have a basic, if not sophisticated, understanding of the estate tax and sometimes income tax<sup>40</sup> rules. It is unrealistic to expect lay executors to possess such knowledge, and thus it is common practice for them to assign this task to the attorney for the estate. Once the tax matters are in the hands of counsel a crucial question rises, namely, what duties remain with the executor with respect to these tax matters. Does the Internal Revenue Code impose on executors an ongoing duty making them guarantors of proper filing, or by retaining counsel to handle the tax matters have executors pursued a prudent path of ordinary business care which relieves them of that obligation? The Government contends that the duty to file the estate tax return is nondelegable and that although an executor might secure assistance in executing the return the ultimate filing obligation forever resides with him.<sup>41</sup> Therefore, late returns in those circumstances where the executor has delegated his filing duty to counsel warrant imposition of the failure to file penalty. Executors, however, argue that by obtaining putatively qualified counsel to handle all estate tax matters they have met their responsibilities.<sup>42</sup> They contend that a delinquent return resulting from error of counsel constitutes reasonable cause for the estate and should prevent the penalty from being assessed. The arguments on both sides are compelling.

### III. RELIANCE ON COUNSEL

#### A. *The Taxpayer's Progress*

Initially, executors who offered the "reliance on counsel" ("attorney reliance") theory as reasonable cause for delinquent estate tax returns met with mixed success. For the most part the

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40. The executor or other personal representative of an estate is required to file an income tax return for the decedent for any year in which the estate earns gross income in excess of \$600. I.R.C. § 6012(a), (b) (1985).

41. A number of cases have held that an executor has a personal and non-delegable duty to file a timely return, and that reliance on the mistaken advice of counsel is not sufficient to constitute "reasonable cause" for failing to fulfill that duty. *See, e.g.,* *Smith v. United States*, 702 F.2d 741, 743 (8th Cir. 1983); *Boeing v. United States*, 650 F.2d 493, 495 (8th Cir. 1981); *Millette & Assocs. v. Commissioner*, 594 F.2d 121, 124-25 (5th Cir.) (per curiam), *cert. denied*, 444 U.S. 899 (1979); *Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957).

42. *See, e.g.,* *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979); *United States v. Kroll*, 547 F.2d 393, 395 (7th Cir. 1977); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950).

factual patterns of reported cases shared a common theme, with successful executors usually being able to demonstrate that the estate's attorney was more than merely an agent hired to file the estate tax return.<sup>43</sup> To demonstrate reasonable cause, generally something other than relying on the attorney to secure a timely filing of the estate return was required.<sup>44</sup> Before *Boyle*, the exact dividing line delineating where reliance on counsel separated reasonable cause from unexcused tardiness was not easily identified.<sup>45</sup> But the courts were willing to distinguish an executor's reliance on counsel's substantive advice from mere procedural (filing) assistance.<sup>46</sup> Whereas "reasonable cause" was consistently found in instances of the former, taxpayer success in the latter was problematical.

An early victory for the proponents of the "reliance on coun-

43. See, e.g., *In re Fisk's Estate*, 203 F.2d 358, 360 (6th Cir. 1953); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947).

44. See *Fleming v. United States*, 648 F.2d 1122, 1126 (7th Cir. 1981) (where executor knows of due date for filing, he may not allege reliance on his counsel as reasonable cause for his late filing); *Rohrbaugh v. United States*, 611 F.2d 211 (7th Cir. 1979). In *Rohrbaugh*, the Seventh Circuit held that reliance upon counsel constituted reasonable cause only when: (1) the taxpayer is unfamiliar with the tax law; (2) the taxpayer makes full disclosure of all relevant facts to the attorney that he relies upon, and maintains contact with the attorney from time to time during the administration of the estate; and (3) the taxpayer has otherwise exercised ordinary business care and prudence. *Id.* at 215, 219.

Additionally, the United States District Court for the Western District of Wisconsin held that "selecting a competent tax expert, supplying him with the necessary information, and asking him to prepare proper returns" are all that ordinary business care and prudence can reasonably demand. *Giesen v. United States*, 364 F. Supp. 33, 36 (W.D. Wis. 1973) (citations omitted).

45. Compare *Fleming v. United States*, 648 F.2d 1122, 1126 (7th Cir. 1981) ("executor" knew of filing date, unsuccessful with reliance on counsel argument as reasonable cause) and *Estate of Lillehei v. Commissioner*, 638 F.2d 65 (8th Cir. 1981) (taxpayer's reliance on attorney to file return did not constitute reasonable cause where taxpayer made no effort to find out when return was due, nor to follow up with his lawyer to make sure the return was not filed late) with *Rohrbaugh v. United States*, 611 F.2d 211, 219 (7th Cir. 1979) (inexperienced taxpayer's reliance on counsel for timely filing and good faith attempt to have return filed on time constituted "reasonable cause" for late filing). For a discussion of *Boyle's* delineation of what may constitute reasonable cause, see *infra* notes 286-95 and accompanying text.

46. See *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979). In *Rohrbaugh*, the Seventh Circuit stressed that the taxpayer's unfamiliarity with the tax law was significant in determining whether his reliance on counsel was reasonable enough to constitute "reasonable cause" for the taxpayer's late filing. *Id.* See also *In re Fisk's Estate*, 203 F.2d 358 (6th Cir. 1953); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1942). In both *Fisk's Estate* and *Hatfried*, the circuit courts emphasized that since the taxpayers relied on counsel for advice in complicated, technical legal matters with respect to the filing of tax returns, reliance was sufficient to constitute a reasonable cause for the tardiness of the filing. *In re Fisk's Estate*, 203 F.2d at 359; *Hatfried*, 162 F.2d at 360.

sel" argument was won in *Adeline McColgan*.<sup>47</sup> Ms. McColgan served as the executrix of her brother's estate, the only asset of which was an interest in a partnership.<sup>48</sup> Following the advice of counsel that this interest was not taxable, an estate tax return was not filed.<sup>49</sup> More than two years after her brother's death, the taxpayer, for reasons not stated, filed an estate tax return upon which the Government assessed the mandatory delinquency penalty.<sup>50</sup> In the suit that ensued, the taxpayer continued to maintain that the partnership interest was not taxable,<sup>51</sup> but the court ruled otherwise.<sup>52</sup> The penalty, however, was abated.<sup>53</sup> In doing so, the court took note of the executrix's unfamiliarity with the law and her adherence to advice rendered by counsel to the effect that a return was not due at all.<sup>54</sup> The court was moved by the fact that the taxpayer believed her attorney's opinion that there were no assets subject to estate taxation and consequently no tax return had to be filed.<sup>55</sup> It concluded that "under the circumstances . . . the failure to file . . . on time . . . was due to reasonable cause and not to wilful neglect."<sup>56</sup> This position was accepted by

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47. 10 B.T.A. 958 (1928).

48. *Id.* at 959. The deceased had held a one-half interest in a partnership engaged in the real estate and loan business. *Id.* The assets of the partnership were composed of real estate and personal property and included an undivided one-fourth interest in some tracts of land then subject to two life interests. *Id.* None of the partnership property, nor any property of the decedent, had ever been turned over to the executrix, but rather, remained in possession and control of the decedent's surviving partner. *Id.*

49. *Id.* Ms. McColgan's attorney had advised her that under her circumstances, a return was not required by law. *Id.*

50. *Id.* at 959-60. The penalty required taxpayer to pay 25% of the total tax. *Id.* The Government also determined a deficiency in the tax in the amount of \$3,222.36. *Id.*

51. *Id.* at 960. Ms. McColgan contended:

- (1) that the partnership assets formed no part of the decedent's estate;
- (2) that respondent had erred in determining the value of the partnership interest; and
- (3) that the penalty imposed by the respondent because of her failure to file an estate tax return within the time required by law was unauthorized and erroneous.

*Id.*

52. *Id.* The court found that since the time to share in the partnership assets passed to the estate after the death of decedent, the assets were taxable. *Id.* The court also noted that petitioner introduced no satisfactory evidence regarding the value of the partnership interest, and that it would affirm the determination of the respondent. *Id.*

53. *Id.* at 961.

54. *Id.* at 960.

55. *Id.* at 960-61.

56. *Id.* at 961.

the United States Tax Court in *Estate of Collino*,<sup>57</sup> and again in *Estate of Christ v. Commissioner*.<sup>58</sup>

In *Collino*, the delinquency penalty was abated upon a showing that the inexperienced administratrix relied upon counsel's advice that an estate tax return need not be filed.<sup>59</sup> The court was persuaded that the administratrix's efforts in retaining a reputable attorney and consulting with the decedent's family attorney, together with counsel's bona fide belief that the gross estate was below the filing requirement amount,<sup>60</sup> constituted reasonable cause. Similarly, reasonable cause for a delinquent return was found in *Christ* because the executor showed that he always had his lawyer prepare his tax returns and that he relied on his lawyer's advice that no estate tax return was due.<sup>61</sup> The court cited three other cases, albeit not estate tax related, as authority for its holding that "attorney reliance" is reasonable cause for late filing if the advice is that no return is due.<sup>62</sup> Of course, this view was not without its limits.<sup>63</sup>

57. 25 T.C. 1026 (1956).

58. 54 T.C. 493 (1970).

59. *Collino*, 25 T.C. at 1036. The court observed that "[h]er lack of experience made her less than competent to serve as administratrix." *Id.*

60. *Id.* At the time of Collino's death, the Code required a return to be filed if the decedent's gross estate exceeded \$60,000. See I.R.C. § 6018 (1954) (current version at I.R.C. § 6018(a)(1), (3) (1985)).

61. *Christ*, 54 T.C. at 553-54. Petitioner alleged that he had always relied on his attorney's advice as to what tax returns needed to be filed and as to when they should be filed. *Id.* at 553. Petitioner alleged that his attorney advised him that no estate tax return need be filed because decedent's property came within the exemption in then I.R.C. § 2032 for gross estates of less than \$60,000. *Id.* (citing I.R.C. § 2032 (1970)). The court was convinced that petitioner's attorney acted in good faith and that petitioner's reliance was reasonable and justified. *Id.* at 554.

62. 54 T.C. at 554 (citing *Portable Indus., Inc. v. Commissioner*, 24 T.C. 571 (1955) (petitioner's reliance on advice from attorney, admitted to practice before tax court, that petitioner was not personal holding company was reasonable cause for failure to file a personal holding company return); *Twinam v. Commissioner*, 22 T.C. 83 (1954) (petitioner's reliance on attorney's advice that payments received from former husband were not includible into income was reasonable cause for failure to file income tax return); *Patino v. Commissioner*, 13 T.C. 816 (1949) (petitioner failed to file income tax return in reliance on attorney's advice that she was nonresident alien and although tax court found that taxpayer was a resident alien, it held that her reliance on counsel was reasonable cause for failure to file return)).

63. See, e.g., *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972). In *Plotkin*, the executrix, an attorney and wife of the decedent, claimed that she relied on the advice of another attorney that there would be no tax due and therefore no need to file a timely return. *Id.* at 1013. The court noted that although there would be no penalty if there were no tax liability, this did not justify disregard of the filing deadline. Thus the penalty imposed on the delinquent return upon which a tax was ultimately due was not abated. *Id.* at 1014.

The more difficult case for executors arose when there was no question concerning whether a return was due, but the delinquency was the result of errors of counsel. In many of the instances where executors prevailed under the "attorney reliance" theory the courts used non-estate tax cases as the basis for the favorable decisions. The two most noteworthy are *Hatfried, Inc. v. Commissioner*<sup>64</sup> and *Haywood Lumber & Mining Co. v. Commissioner*.<sup>65</sup> These oft-cited cases help form the bedrock for proponents of the "attorney reliance" theory.

In *Hatfried*, plaintiff taxpayer was a corporation which neither filed a return nor paid tax as a personal holding company.<sup>66</sup> All of the company's tax returns were prepared and filed by an accountant, who, despite being apprised of all the facts and circumstances concerning the taxpayer's activities, never indicated that a personal holding company return was due.<sup>67</sup> Consequently, plaintiff never filed such a tax return.<sup>68</sup> When the Government determined that a personal holding company tax was due, it simultaneously imposed the then mandatory twenty-five percent addition to the tax for the taxpayer's failure to file a timely return.<sup>69</sup> The circuit court concluded that the tax was properly assessed, but reversed the tax court's determination that the penalty was proper.<sup>70</sup> After stating that it is generally the tax court's duty to evaluate the facts for the purpose of determining whether "rea-

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64. 162 F.2d 628 (3d Cir. 1947).

65. 178 F.2d 769 (2d Cir. 1950).

66. *Hatfried, Inc. v. Commissioner*, 5 T.C.M. (CCH) 77, 78 (1946).

67. *Id.*

68. *Id.*

69. 162 F.2d at 629. The penalty in *Hatfried* was assessed pursuant to I.R.C. § 291 (1947). 162 F.2d at 635. The modern version of that statute is substantially the same as its predecessor. See I.R.C. § 6651 (1985). Thus, the case law under the earlier statute is applicable in interpreting the current Code section. For example, the Supreme Court in *Boyle* cited *Hatfried* in interpreting the "willful neglect" standard encompassed in § 6651. See *Boyle*, 105 S. Ct. at 690. See also *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979) (citing *Hatfried* to interpret "reasonable cause" requirement of § 6651).

For a discussion of relevant aspects of *Boyle*, see *supra* notes 5-6 & *infra* notes 285-308 and accompanying text. For a discussion of relevant aspects of *Rohrbaugh*, see *infra* notes 221-47. For the relevant text of § 6651, see *supra* note 7.

70. 162 F.2d at 635. The court noted that "the taxpayer here, in fact and in law, exercised such ordinary business care and prudence as to bring him within the rule that 'reasonable cause' means nothing more than the exercise of ordinary business care and prudence and that there was no 'willful neglect.'" *Id.* On this basis, the court concluded that the tax court's 25% delinquency penalty was inappropriate. *Id.*

sonable cause” is present,<sup>71</sup> the circuit court noted that it was not precluded from making its own factual review if the tax court’s review was “without ‘any substantial basis.’ ”<sup>72</sup> Given the record before it, the court deemed it appropriate to make its own determination of “reasonable cause.”

At the outset the *Hatfried* court set down two controlling principles. First, “[r]easonable cause means *nothing more* than the exercise of ordinary business care and prudence”;<sup>73</sup> and second, tax penalties were not intended to attach to accidental as opposed to intentional conduct.<sup>74</sup> Moreover, the court pointed out that 1) merely failing to file a return does not in itself prevent a finding of “reasonable cause,”<sup>75</sup> and 2) when dealing with penalty statutes, questions of doubt must be decided in favor of the accused delinquent.<sup>76</sup> With these ground rules in mind the court proceeded to review the record.

The court in *Hatfried* noted that the taxpayer made a full disclosure to the accountant who in turn reported the information to the Government.<sup>77</sup> These facts were sufficient to distinguish the

71. *Id.* at 631 (citing *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944); *Dobson v. Commissioner*, 320 U.S. 489 (1943)). The court went on to state:

Whether, in a given situation, the elements which constitute “reasonable cause” or “willful neglect” are *present* is a question of fact; what elements *must* be present to constitute “reasonable cause” or “willful neglect” is a question of law. It is unclear that in making its determination as to whether on the facts there was “reasonable cause,” the Tax Court must apply the legal standard or measure contained in that term.

*Id.* at 635 (emphasis in original).

72. 162 F.2d at 631, 635 & n.3 (quoting *Commissioner v. Scottish American Inv. Co.*, 323 U.S. 119, 124 (1944)). The court noted that: “If a substantial basis is lacking [for the tax court’s finding and conclusion] the appellate court may indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings . . . .” *Id.* at 635 n.3.

73. *Id.* at 632 & n.1 (citing *Southeastern Finance Co. v. Commissioner*, 153 F.2d 205 (5th Cir. 1946); *Girard Inv. Co. v. Commissioner*, 122 F.2d 843 (3d Cir. 1941)) (emphasis supplied by *Hatfried* court).

74. 162 F.2d at 632 & n.2 (citing *United States v. Murdock*, 290 U.S. 389, 394 (1933)). The court explained that this principle was evidenced by the language of then I.R.C. § 291: “and not due to willful neglect.” *Id.* at 632 (citing I.R.C. § 291 (1936)).

75. *See* 162 F.2d at 632. The court noted that originally Congress had made imposition of the penalty mandatory in § 291 of the 1934 Code, but that Congress amended the Code in 1936 to provide for a reasonable cause exception. *Id.* (citing I.R.C. § 291 (1934), amended by I.R.C. § 291 (1936)). The court then noted that the tax court itself had construed the amendment to mean that the imposition of the penalty for late filing is no longer mandatory. 162 F.2d at 632 (citing *Estate of Kirchner*, 46 B.T.A. 578 (1941)).

76. 162 F.2d at 633 (citing CRAWFORD, STATUTORY CONSTRUCTION § 240, at 462).

77. *Id.* The court noted that the taxpayer’s evidence established two things: (1) disclosure of all the facts by the taxpayer to the accountant who prepared the

instant case from the tax court's controlling authority, *Tarbox Corporation*,<sup>78</sup> where the taxpayer had not made a complete disclosure.<sup>79</sup> The court moved on to the Government's contention that ignorance of the law, whether on the part of the taxpayer or its representative, does not support a case of "reasonable cause."<sup>80</sup> The court identified a number of earlier cases where the tax court had explicitly held to the contrary.<sup>81</sup> The court went on to note the absurdity of the Treasury Department sanctioning taxpayers' use of lawyers and accountants to prepare tax returns on the one hand,<sup>82</sup> and then holding taxpayers responsible for counsel's errors on the other.<sup>83</sup> It also labeled as an "inconceivable proposi-

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return, and (2) disclosure by the accountant to the Government of all those facts. *Id.*

78. 6 T.C. 35 (1946).

79. *Id.* at 37. In *Tarbox*, the petitioner, in reliance on advice from an attorney, did not file a personal holding company return. *Id.* at 35-36. The evidence showed that the president and sole stockholder of the corporation only briefly discussed the corporation's status under the tax laws with his attorney. *Id.* at 37. The court noted that:

[T]he reasons advanced by the petitioner for its failure to file a personal holding company return either merely reduce themselves to a plea of ignorance of the law; or amount to reliance upon an agent to whom, apparently, insufficient information was disclosed or who likewise was unfamiliar with the requirements of the taxing statute. Neither is sufficient excuse.

*Id.* (citations omitted).

80. *Hatfried*, 162 F.2d at 633. The court summarized the Government's argument as follows: "[w]here the taxpayer relied on its accountant's advice (given by the accountant in ignorance of the law), no case of reasonable cause is established." *Id.*

81. *Id.* (citing *Girard Inv. Co. v. Commissioner*, 122 F.2d 843 (3d Cir. 1941) (reliance on accountant who was given all relevant information was reasonable cause of failure to file personal holding company return); *C.R. Lindback Found. v. Commissioner*, 4 T.C. 652 (1945) (reliance on advice of counsel and good faith belief that petitioner was tax-exempt charitable organization constituted reasonable cause for failure to file income tax returns), *aff'd*, 150 F.2d 986 (3d Cir. 1945); *Three States Lumber Co. v. C.I.R.*, 4 T.C.M. (CCH) 955 (1945) (reliance on advice of tax advisers was reasonable cause for failure to file excess profits tax return), *rev'd on other grounds*, 158 F.2d 61 (7th Cir. 1946)).

82. 162 F.2d at 634.

83. *See* 162 F.2d at 634. The court remarked:

Previously we pointed out that the Treasury Department has long given sanction to the practice of taxpayers in enlisting the aid of accountants in the preparation of their tax returns. To this may be added that the Treasury Department regularly admits accountants to practice before it in representation of taxpayers and the Tax Court does the same.

To accord the status of "experts" on the tax laws to accountants for representing purposes and then to hold that taxpayers who entrust to them the task of preparing their tax returns run the risk of paying heavy penalties should they err in the discharge of their assignment creates an absurd situation.

*Id.* Additionally, tax practitioners required to enroll in order to practice before



tion” the argument that the return preparer is the taxpayer’s agent and consequently the taxpayer is the principal liable for his agent’s conduct, including a delinquent filing.<sup>84</sup>

The *Hatfried* decision appeared to be something more than just a taxpayer victory. The court seemed to set down some important operating rules for both the Government and the tax court to follow. Of additional significance, the court held that the presence or absence of the elements constituting “reasonable cause” is a factual question, but that identification of these elements is a question of law.<sup>85</sup> Unfortunately, the court failed to definitely identify any of those elements. It was satisfied to conclude from the record that the taxpayer came within the rule of “reasonable cause,” which required the exercise of ordinary business care and prudence, and nothing more.<sup>86</sup> Although it did not so state specifically, the court seemed to suggest that a complete disclosure to counsel is a necessary element of the “ordinary business care and prudence” standard.<sup>87</sup>

*Haywood Lumber* involved a personal holding company tax problem as well.<sup>88</sup> As in *Hatfried*, the taxpayer corporation made complete disclosure of all facts and records to its accountant, who nonetheless did not have the taxpayer file the required return.<sup>89</sup> The tax court ruled that since the taxpayer did not question the accountant concerning what returns would be required, but merely passively accepted advice, it had not exercised ordinary business care and prudence.<sup>90</sup> Consequently, the tax court deter-

the IRS, *see supra* note 4, must now also participate in continuing professional education. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 51 Fed. Reg. 2875 (1986) (to be codified at 31 C.F.R. pt. 10). The concept of sanctioned “experts” is thus further buttressed.

84. 162 F.2d at 635. The court stated that the exercise of ordinary business care and prudence is evidenced where taxpayers rely on agents to whom the Treasury Department accords recognition as “experts” and “counsel.” *Id.*

85. *Id.*

86. *Id.* The court seemed to focus simply on the idea that a taxpayer’s good faith reliance on an accountant’s wrong advice was not the type of situation to which the late filing penalty applied. *Id.*

87. *See id.* at 632, 633, 635. In concluding that the taxpayer exercised ordinary business care and prudence, the court repeatedly referred to the fact that the record indicated that the taxpayer had made “a full disclosure” and that his accountant “had been advised of the facts and circumstances.” *Id.* at 632-35.

88. 178 F.2d at 770.

89. *Id.* at 771. Apparently, the accountant, although fully informed of the taxpayer corporation’s business and of the opinion that it was a personal holding company, inadvertently failed to inform the officers of the corporation that a personal holding company tax return was required. *Id.* at 770.

90. *Haywood Lumber & Mining Co. v. Commissioner*, 12 T.C. 735, 740

mined that there was no "reasonable cause" and no basis for avoiding the penalty.<sup>91</sup>

The circuit court made short shrift of the tax court's position. It noted that the taxpayer did all that ordinary business care and prudence could reasonably expect.<sup>92</sup> Moreover, it suggested that it would be unrealistic, if not patently unfair, to require a taxpayer to ask specific questions for the purpose of determining for itself whether it is required to file a certain return.<sup>93</sup> To accomplish such a feat a taxpayer would essentially have to understand all of the various taxes to which it could possibly be subject.<sup>94</sup> If the taxpayer had this knowledge, there would be no need to seek the advice of an expert in the first place. Relying, *inter alia*, on *Hatfried*, the court held that good faith reliance on the advice of counsel constitutes reasonable cause when delinquent tax returns are filed.<sup>95</sup> The *Haywood Lumber* court went one step further and rejected one of its earlier decisions that held a taxpayer responsible for the failings of his tax counsel-agent.<sup>96</sup> The earlier decision was inconsistent with holding that reliance on counsel could con-

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(1949). The tax court noted that there was no evidence that the taxpayer corporation investigated its tax liability as a personal holding company or consulted anyone on this matter, either before or after corporate returns were prepared. *Id.* The court suggested that "it might have been a different matter" if petitioner had asked its accountant whether it was liable for the personal holding company surtax and whether it should file any forms, and had been advised that such filing was not required. *Id.*

91. *Id.*

92. *Haywood Lumber*, 178 F.2d at 771. The circuit court stated that "[w]hen a corporate taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand." *Id.*

93. *Id.* The court stated that "to require [a taxpayer] to inquire specifically about the personal holding company act nullifies the very purpose of consulting an expert." *Id.*

94. *Id.* The court suggested that, under a standard requiring inquiry, taxpayers would have to inquire specifically about the applicability of various legal principles that might be relevant to the facts. *Id.*

95. *Id.* at 771-72 (citing *Hatfried, Inc. v. Commissioner*, 162 F.2d 628, 635 (3d Cir. 1947)).

96. *See id.* at 771 (citing *Berlin v. Commissioner*, 59 F.2d 996 (2d Cir.), *cert. denied*, 287 U.S. 242 (1932)). In *Berlin*, the taxpayer, through his accountant, requested and was granted an extension of time in which to file an income tax return. 59 F.2d at 996. Because of illness, the taxpayer requested a second extension. *Id.* at 997. The second extension was granted on the condition that an estimated return be filed with one-quarter of the estimated tax due. *Id.* The accountant for the taxpayer merely filed a return showing gross income of \$50,000 and deductions equal to that amount. *Id.* The court held that the estimated return was inadequate and therefore did not constitute a filing. *Id.*

stitute "reasonable cause." Recognizing this, the *Haywood Lumber* court stated:

To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's or accountant's advice *cum onere*, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than one of a layman.<sup>97</sup>

There seems to be no doubt that the court believed a principal-agent theory is not a controlling influence when determining whether reliance on counsel constitutes reasonable cause for delinquent tax return filers.

Taken together, the two cases provide the foundation for the "attorney reliance" theory. *Hatfried* made clear that establishing "reasonable cause" meant merely exercising ordinary business care and prudence.<sup>98</sup> Selecting an expert, whether legal counsel or an accountant, to handle one's tax matters and relying on such expert's advice was accepted as exhibiting ordinary business care and prudence.<sup>99</sup> Additionally, the court dismissed as absurd any attempt to employ a principal-agent argument to impute the tax expert's negligence or ignorance<sup>100</sup> to the taxpayer so as to preclude the latter from meeting the ordinary care and prudence standard. *Haywood Lumber* reaffirmed the principles set out in *Hatfried*, emphasizing the frivolity of applying a principal-agent theory to these types of "attorney reliance" cases.<sup>101</sup> Of equal importance in *Haywood* was the assertion that the taxpayer had no duty to "quiz" the tax expert about all possible tax exposures.<sup>102</sup> Ordinary business care and prudence required only that the preparer be furnished all the necessary information and re-

97. 178 F.2d at 771.

98. For a discussion of *Hatfried*, see *supra* note 66-87 and accompanying text.

99. For a discussion of this aspect of *Hatfried*, see *supra* notes 81 & 87 and accompanying text.

100. For a discussion of this aspect of *Hatfried*, see *supra* notes 83-84 and accompanying text. In most instances, executors advance theories of counsel's negligence as the basis for establishing reasonable cause. Some counsel may just be unaware of the law, it should be noted, and in this context their ignorance should not be distinguished from simple negligence.

101. For a discussion of relevant aspects of *Haywood Lumber*, see *supra* notes 96-97 and accompanying text. For a discussion of relevant aspects of *Hatfried*, see *supra* notes 83-84 and accompanying text.

102. See 178 F.2d at 771. For a discussion of this aspect of *Haywood Lumber*, see *supra* notes 93-94 and accompanying text.

quested to file the required return(s). A taxpayer's passivity beyond that point did not undermine those actions which constituted reasonable cause.<sup>103</sup> Although never presented explicitly as a rule, exercising care and prudence implicitly requires honest dealing. Thus, taxpayers were required to make full disclosures to their preparers,<sup>104</sup> and to rely in good faith on advice received.<sup>105</sup>

An additional noteworthy point remains. Both cases involved situations where returns were not filed because taxpayers, relying on counsel, had no reason to believe that the returns were required.<sup>106</sup> To a large degree the cases can be read to say nothing more than *McColgan*, *Collino*, and *Christ*.<sup>107</sup> Could the principles enunciated in *Hatfried* and *Haywood Lumber* carry the day when the taxpayer was aware that a return was required, but nonetheless failed to file it on time? An answer came rather quickly in *In re Fisk's Estate*.<sup>108</sup>

The facts presented by the *Fisk* court are sparse, but it appears that the executor of Fisk's estate retained counsel for the purpose of preparing and filing the estate tax return.<sup>109</sup> There was some concern expressed by the tax court as to how long

103. 178 F.2d at 771.

104. Although in *Haywood Lumber* the court did not hold that full disclosure was a requisite element to find reasonable cause, it did stress that the taxpayer's accountant was given all the information necessary for rendering the proper tax advice. *See id.* at 770.

105. *See id.* at 771. In rejecting *Berlin*, the court ruled that cases holding that reliance on counsel constitutes reasonable cause are inconsistent with the *cum onere* doctrine. *Id.* (citing *Berlin v. Commissioner*, 59 F.2d 996 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932)). For a discussion of *Berlin*, and the *Haywood* court's rejection of it, see *supra* note 96 and accompanying text.

106. *See Haywood Lumber*, 178 F.2d at 771; *Hatfried*, 162 F.2d at 632.

107. The *McColgan*, *Collino*, and *Christ* courts held that since the executors in those cases were unfamiliar with tax law and relied in good faith on attorney advice that no returns needed to be filed, there was "reasonable cause" for the late filing of returns which were required to be filed. *See Christ*, 54 T.C. at 554; *Collino*, 25 T.C. at 1036; *McColgan*, 10 B.T.A. at 961. For a discussion of *Christ*, see *supra* notes 61-63 and accompanying text. For a discussion of *Collino*, see *supra* notes 59-60 and accompanying text. For a discussion of *McColgan*, see *supra* notes 47-56 and accompanying text.

108. 203 F.2d 358 (6th Cir. 1953).

109. *See id.* at 359. The Sixth Circuit noted that the tax court made the following findings of fact:

The evidence on this phase of the case is meager. We know that petitioner turned the preparation and filing of the estate tax return over to an attorney. How long before the due date that was done is not shown. The attorney had had but a limited experience with tax matters, but he did consult respondent's regulations before preparing and mailing the return. No explanation is offered as to why mailing was put off until the due date. The most we can say is that possibly the attorney

before the due date of the return the taxpayer waited until hiring counsel,<sup>110</sup> but the circuit court was not particularly concerned with the issue.<sup>111</sup> In any event the return was mailed on its due date but received by the Government one day later and a delinquency penalty was assessed accordingly.<sup>112</sup> The court, relying on *Hatfried* and *Haywood Lumber* throughout its brief opinion, abated the penalty.<sup>113</sup> In so doing it approved the principle that reliance on counsel constitutes "reasonable cause" as a matter of law,<sup>114</sup> and extended the rule to cover the late filing of tax returns of taxpayers who seemingly were aware of the correct due date.<sup>115</sup>

*Fisk's* apparently broad interpretation and application of *Hatfried* and *Haywood Lumber* was not universally accepted<sup>116</sup> but it

assumed that if he mailed the return on the due date it would be treated as having been timely filed.

*Id.* (quoting *Estate of Fisk v. Commissioner*, 11 T.C.M. (CCH) 77, 78-79 (1952)).

110. *See id.* Although the tax court did not expressly find that the taxpayer waited too long to turn the preparation of the estate tax return over to an attorney, the tenor of the court's comments suggests that the judge suspected that the taxpayer did, indeed, wait too long to find appropriate assistance. *Id.* For the language of the tax court's findings, see *supra* note 109.

111. *See id.* at 359. Although quoting the language from the tax court decision discussing the nearness in time of the due date to the date upon which the taxpayer hired counsel, the Sixth Circuit seemed more impressed with the fact that the return itself indicated that a considerable period of time had been spent in its preparation. *Id.* at 359-60. In any case, the court never seemed to integrate the tax court's finding into its decision. *See id.* For the language of the tax court decision, see *supra* note 109.

112. *Id.* at 358-59.

113. *Id.* at 359-60 (citing *Haywood Lumber*, 178 F.2d 769; *Hatfried*, 162 F.2d 628, 635)).

114. *Id.* at 360.

115. *Id.* The court stated:

[The *Haywood Lumber*] rule, we hold, applies to the filing of tax returns as well as to reliance upon technical advice in complicated legal matters. We think this conclusion is in accord with the principle declared by the Supreme Court that the penalties under the revenue laws were designed to be imposed upon conduct "which is intentional, or knowing, or involuntary as distinguished from accidental."

*Id.* (quoting *United States v. Murdock*, 290 U.S. 389, 394 (1933)).

116. *See, e.g., Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957) (where executor knew tax return was due, relied on attorney for timely filing, and made no attempt to determine whether attorney was acting with diligence, there was no reasonable cause and late filing penalty was not abated); *Pfeiffer v. United States*, 315 F. Supp. 392 (E.D. Cal. 1970) (executrix's reliance upon accountant to file timely estate tax returns was not reasonable cause for late filing because executrix was under obligation to ascertain her obligations and to oversee activities of accountant). Moreover, it should be noted that in *Boyle*, both *Haywood Lumber* and *Hatfried* were cited with approval, but their application was limited to cases in which the taxpayer relied on counsel's advice as to whether or not a return had to be filed at all. *See Boyle*, 105 S. Ct. at 693 (citing *Haywood Lumber*, 178 F.2d 769; *Hatfried*, 162 F.2d 628).

was incorporated into the majority view expressed in *Geisen v. United States*.<sup>117</sup> The *Geisen* court proceeded to enunciate conditions drawn from prior case law, which, if met, would enable reliance on counsel to constitute "reasonable cause." The conditions were: The taxpayer must 1) be unfamiliar with tax law;<sup>118</sup> 2) have made a full disclosure of all relevant facts to counsel;<sup>119</sup> and 3) have exercised ordinary business care and prudence.<sup>120</sup> In the same paragraph in which the third condition was listed, the court stated that selecting competent counsel, furnishing him with the necessary information, and requesting that he prepare the returns are sufficient to meet this condition.<sup>121</sup> This is, of course, somewhat confusing, because satisfying the last condition in and of itself appears to constitute "reasonable cause." It seems that a more appropriate approach would have been to consider reliance on counsel as constituting reasonable cause if the first and second conditions are met, *i.e.*, if there is complete disclosure of all the relevant facts by a taxpayer unfamiliar with the laws. But even if the *Geisen* court did not articulate its test in the most eloquent manner, it nonetheless synthesized the then majority viewpoint<sup>122</sup> into a workable model.

The *Geisen* test was refined in *United States v. Gray*.<sup>123</sup> In *Gray*, the executrix hired an experienced attorney to handle the estate, including the filing of any necessary tax returns.<sup>124</sup> The executrix supplied counsel with all requested materials, but because of the attorney's mistaken belief as to its due date, the estate tax return was filed late.<sup>125</sup> A delinquency penalty was assessed. The plain-

117. 369 F. Supp. 33 (W.D. Wis. 1973).

118. *Id.* at 35 (citing *Estate of Moyer v. Commissioner*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Orient Inv. & Finance Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948)).

119. *Id.* at 36 (citing *Haywood Lumber*, 178 F.2d 769; *Hatfried*, 162 F.2d 628).

120. *Id.* (citing *Haywood Lumber*, 178 F.2d at 771).

121. *Id.* (citations omitted).

122. This view can be found in the line of cases that includes *In re Fisk's Estate*, 203 F.2d 358 (6th Cir. 1953); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Orient Inv. & Finance Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948). The *Geisen* court noted that the Eleventh Circuit had adopted the majority rule in *Commissioner v. American Ass'n of Eng'rs Employment Co.*, 204 F.2d 19 (7th Cir. 1953). 369 F. Supp. at 36.

123. 453 F. Supp. 1356 (W.D. Mo. 1978).

124. *Id.* at 1358. The court noted that the attorney had been recommended to the executrix because the attorney had been involved in probate and estate administration for more than twenty years. *Id.*

125. *Id.* Although the attorney informed the executrix that an estate tax return had to be filed, he did not tell her when it was due. *Id.* The executrix did not contact anybody else regarding the estate, but relied on the attorney to han-

tiff argued that reliance on counsel by a taxpayer unfamiliar with the law who makes full disclosure to the preparer constitutes "reasonable cause" as a matter of law.<sup>126</sup> The Government countered that such reliance could only be considered reasonable with respect to whether or not a return had to be filed, and not to the actual physical filing of the return.<sup>127</sup> The court was able to avoid addressing the validity of such a distinction because the facts of the major authority for the Government's proposition were clearly distinguishable from the facts under review.<sup>128</sup> The court went on to hold that reliance on counsel constitutes reasonable cause so long as the taxpayer has no actual knowledge, from whatever source, of the due date of the return.<sup>129</sup> Additionally, the "passivity" position set forth in *Haywood Lumber* was reaffirmed, as the court stated there was no duty on a taxpayer to either monitor counsel's activities or research the tax law to ascertain a filing deadline if there is no knowledge of counsel's mishandling of tax matters.<sup>130</sup> Although *Gray* is clearly a pro-taxpayer decision, it appeared to add an important caveat to those seeking

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dle everything. *Id.* The return was due some nine months after the decedent's death, but the attorney thought he had 15 months in which to get it filed. *Id.* The return was actually filed almost 15 months to the day from decedent's death. *Id.*

126. *Id.*

127. *Id.* The Government attempted to limit reliance on counsel as reasonable cause to those cases in which the taxpayer relied on the advice of counsel that no return was due. *Id.* (citing *United States v. Kroll*, 547 F.2d 393 (7th Cir. 1977)). In *Kroll*, the executor retained an experienced attorney to handle the administration and probate of his mother-in-law's estate. 547 F.2d at 394-95. The attorney did not file the tax estate return within the time provided by law. *Id.* at 395. The estate paid the assessed penalties and brought a refund suit. *Id.* The Seventh Circuit reversed the trial court's decision in favor of the taxpayer, noting that the taxpayer knew that the return had not been timely filed, yet took no affirmative steps to remedy the situation. *Id.* at 396-97. The court concluded that, although the taxpayer was not an expert and had made full disclosure of the facts necessary for the attorney to compute the estate's tax, he did not need to rely on the attorney to file the return because he knew that it was overdue. *Id.* at 395.

128. *See* 453 F. Supp. at 1358. The *Gray* court relied heavily on the fact that the taxpayer did not know the return's due date nor that the return became overdue. *Id.* at 1361.

129. *Id.* The court cautioned, however, that "[i]f the taxpayer acquires knowledge of the due date from any source, reliance on an attorney after that date cannot amount to "reasonable cause." *Id.*

130. *Id.* at 1360-61. The court noted that "[u]nless the taxpayer knows when the return is due, he would have to delve into the Tax Code and its regulations to find out. It is this task that the taxpayer is paying the lawyer to perform." *Id.* at 1361. *See Haywood Lumber*, 178 F.2d at 771. For a discussion of the *Haywood Lumber* court's analysis of the passivity position, see *supra* notes 101-03 and accompanying text.

protection under the attorney reliance theory, namely, the taxpayer must have no actual knowledge of the due date of the return. On the other hand, it also re-established that taxpayers need not make continued inquiry of counsel to be considered as exercising ordinary business care and prudence.

A review of other cases where reliance on counsel constituted "reasonable cause" for delinquent filing<sup>131</sup> would offer nothing of significance to the immediate point to be made. The rules set out in *Hatfried* and *Haywood Lumber*, synthesized in *Geisen* and refined by *Gray*, are for the most part the same ones used by the courts reaching pro-taxpayer results. For reliance on an attorney to constitute "reasonable cause" the taxpayer must lack a general understanding of tax matters and, without actual knowledge of the due date of the return, hire counsel to file the return and make full disclosure to assist in that effort. These were the legal elements that would, if factually proven, permit a penalty to be abated. The process required a case-by-case deliberation, stressing the absence of a per se rule as to whether or not reliance on counsel constituted "reasonable cause."

### B. *The Other Side*

Notwithstanding some success, the "attorney reliance" theory was not warmly embraced by all courts. Even if all of the *Geisen* conditions were met, victory was not assured.<sup>132</sup> Moreover, putting aside the often stated belief that "reasonable cause" is primarily a question of fact to be determined on an individual case-by-case basis, other criteria for establishing the presence or absence of "reasonable cause" were formulated and given priority over the *Geisen* test. The most notable of these involved the recognition of a nondelegable duty on the executor to file the estate tax return. This theory was impressively presented in *Ferrando v. United States*.<sup>133</sup>

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131. Other cases cited for this proposition include: *Orient Inv. & Finance Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948); *Girard Inv. Co. v. Commissioner*, 122 F.2d 843 (3d Cir. 1941); *Estate of Bradley v. Commissioner*, 33 T.C.M. (CCH) 70 (1974), *aff'd*, 511 F.2d 527 (6th Cir. 1975).

132. *See, e.g.*, *Smith v. United States*, 702 F.2d 741, 743 (8th Cir. 1983); *Millette & Assocs. v. Commissioner*, 594 F.2d 121, 124-25 (5th Cir.) (*per curiam*), *cert. denied*, 444 U.S. 899 (1979); *Logan Lumber Co. v. Commissioner*, 365 F.2d 846, 854 (5th Cir. 1966); *Ferrando v. United States*, 245 F.2d 582, 589 (9th Cir. 1957). In all of the above cases the courts held that a taxpayer has a nondelegable duty to file a tax return on time and that reliance on counsel will not constitute reasonable cause for the taxpayer's tardy filing.

133. 245 F.2d 582, 589 (9th Cir. 1957).



In *Ferrando*, the decedent's surviving spouse and son, as co-executors, employed an attorney to handle, *inter alia*, the filing of the estate tax return. The return was filed late.<sup>134</sup> It is clear even from the brief presentation of the facts that there were questionable activities surrounding the filing of the estate tax return,<sup>135</sup> and ultimately a criminal proceeding ensued.<sup>136</sup> In any event the court accepted the trial court findings that the taxpayers 1) knew a return was due; 2) made no attempt to ascertain whether the attorney was in the process of filing or had filed the return; 3) were wilfully neglectful in not questioning the attorney's diligence; and 4) did not have "reasonable cause" for the delinquent filing.<sup>137</sup> The court offered the following general rule:

The filing of a tax return when due is a *personal, nondelegable duty of the taxpayer*; as a general proposition, it is no valid excuse for him to say that the matter was put in charge of an employee or accountant or attorney, no matter how trustworthy that person may be.<sup>138</sup>

The only authority cited by the court for this proposition was *American Law Reports*.<sup>139</sup> Nonetheless, the court apparently adopted it as the controlling rule for its decision because it continued its discussion in a conclusive fashion: "Accordingly, we hold that the appellants have failed to discharge their burden of establishing that the failure to file a return was due to reasonable cause . . . ." <sup>140</sup>

Although not stated, it is evident that the executors were ar-

134. *Id.* at 584.

135. *See id.* Notably the check tendered for payment of the tax bore a date earlier than the due date of the return, even though the executor's checkbook showed a substantially later date for the check. *Id.*

136. *See Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1954). Mr. Cosgrove, the attorney for the estate of Ferrando, was charged and convicted of defrauding the United States by filing fraudulent estate tax returns. *Id.* His conviction, however, was reversed on appeal. *Id.*

137. 245 F.2d at 587. The Ninth Circuit found the testimony presented substantial evidence to support those findings of fact. *Id.* at 588. In this regard the court observed that it is required to give the same weight to tax court decisions as is given to district court decisions. *Id.* (citing *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949); *Pacific Homes v. United States*, 230 F.2d 755, 759 (9th Cir. 1956); *FED. R. CIV. P.* 52(a)).

138. *Id.* at 589 (quoting *Annot.*, 3 A.L.R. 2d 617, 619 (1949) (emphasis added)).

139. *Id.*

140. *Id.* at 589. The court concluded that:

[T]here is no reason for this court to disturb the findings of the District Judge, to the effect that the failure of the four appellants to file proper estate tax returns was *not* due to reasonable cause; and that the defec-

guing a "reliance on counsel" theory to avoid imposition of the penalty. This can be gleaned from the discussion of the executors' backgrounds, business experiences, and other dealings with the lawyer.<sup>141</sup> But these items would appear to have no bearing on the final decision since the nondelegability of the duty to file a return should apply to inexperienced as well as knowledgeable taxpayers equally. It is unfortunate that what was to become an oft-cited rule arose in a case containing such unsavory facts. One can only wonder if the court would have enunciated such a harsh, strict rule if the activities of the taxpayers and counsel in *Ferrando* had not bordered on fraud. Speculation of this type, however, may have been put to rest by *Pfeiffer v. United States*,<sup>142</sup> a case having much greater taxpayer sympathy appeal but the same costly result.

In *Pfeiffer*, the elderly widow of the decedent served as executrix.<sup>143</sup> She entrusted the administration of the estate to her family attorney, who had also prepared the decedent's will.<sup>144</sup> The estate tax return was filed late, apparently because a deductible claim against the estate was in doubt.<sup>145</sup> This unknown amount

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tive return filed before the due date by the appellants . . . did not protect them from the assignment of the twenty-five percent penalty.

*Id.* (emphasis in original).

141. *See id.* at 585-86. The court noted in its statement of the facts that Mr. Cosgrove had represented the decedent in other legal matters, and had drawn his will. *Id.* at 584. The defendant co-executors expressed to the court decedent's inexperience in business matters and limited education. *Id.* at 585. From defendants' statement of the case, the court discerned that defendants' argument was premised on the attorney reliance theory. *Id.* at 586.

142. 315 F. Supp. 392 (E.D. Pa. 1970).

143. *Id.* at 393. Although the age of the executrix, Mrs. Pfeiffer, is not disclosed, the facts do indicate that she attended business college around 1910, some fifty plus years before becoming executrix. *Id.* at 395.

144. *Id.* The attorney then hired a certified public accountant to prepare and file the tax return. *Id.*

145. *Id.* at 395 & n.3. The court noted that the accountant apparently felt that he could not accurately compute the estate tax until the exact amount of a claim against the Pfeiffer estate was determined. *Id.* The claim had been filed against the estate by the California State Department of Mental Hygiene for the future support of Thelma Pfeiffer, the daughter of the decedent by a prior marriage. *Id.* at 393 & n.1. Thelma had been committed to the Napa State Hospital as a mentally ill person in 1935 and had been a patient there ever since. *Id.* at 393.

The Department of Mental Hygiene made its claim for future support of Thelma pursuant to § 205 of the California Civil Code. *See CAL. CIV. CODE* § 205 (West 1976).

This statute provides:

If a parent chargeable with the support of a child dies, leaving it chargeable to the county, or leaving it confined in a state institution to be cared for in whole or in part at the expense of the State, and such

prevented the preparer from computing the estate tax due.<sup>146</sup> The taxpayer contended that in light of her lack of business and tax experience her total reliance on competent counsel to take care of the affairs of the estate manifested the exercise of ordinary business care and prudence and constituted "reasonable cause."<sup>147</sup>

The court noted that, upon assuming the position of executrix, decedent's widow became obligated to do more than make a complete delegation of her duties.<sup>148</sup> She was obligated to minimally oversee the administration of the estate and, at the least, to find out what her duties were.<sup>149</sup> The court thus concluded that she should have known both that an estate tax return was required and when it was due.<sup>150</sup> The court also noted that the executrix signed a form stating that a return was due.<sup>151</sup> However, the latter fact did not seem to be of much importance. The court, citing *Ferrando*, went on to recite a flat rule that "reliance on an attorney or accountant to file an estate tax return [does] not con-

parent leaves an estate sufficient for its support, the supervisors of the county or the director of the state department having jurisdiction over the institution involved, as the case may be, may claim provision for its support from the parent's estate by a civil action, and for this purpose may have the same remedies as any creditors against the estate, and against the heirs, devisees, and next of kin of the parent.

*Id.*

146. 315 F. Supp. at 395. The claim was eventually satisfied by payment of \$12,148.42 from the Pfeiffer estate to the guardian of the person and the estate of Thelma for her future support. *Id.* at 393.

147. *Id.* at 395-96.

148. *Id.* at 396. The court also noted that the position as executrix was not an honorary one, as decedent's widow received a commission for fulfilling her obligations. *Id.*

149. *Id.* (citing *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969)). For a discussion of *Duttonhofer*, see *infra* notes 153-65 and accompanying text.

150. 315 F. Supp. at 396.

151. *Id.* Plaintiff had signed a Tax Form 704, entitled "Estate Tax Preliminary Notice." *Id.* The Internal Revenue Code requires every executor to notify the IRS that he has qualified to be the executor of the estate in such manner and time as the regulations require. See I.R.C. § 6036 (1985). A treasury regulation required that every citizen of the United States whose gross estate at the time of death exceeded \$60,000 to file a preliminary notice on Form 704 within two months of death. Treas. Reg. § 20.6036-1(a). Subsection (b) of that regulation required the duly qualified executor to file the notice. *Id.* § 20.6036-1(b). Form 704 contained a notice informing the executor that a return was due within 15 months from the date of death of the decedent, and that failure to file timely would result in the imposition of a penalty. However, Treas. Reg. § 20.6036-1 was amended by T.D. 7238, 37 Fed. Reg. 28,721 (1972), so that Form 704 was required only for estates of decedents dying before January 1, 1971. See Treas. Reg. § 20.6036-1 (1985).

stitute reasonable cause for late filing . . . .”<sup>152</sup> This language leaves little doubt that *Ferrando* was interpreted as having established a per se rule against reliance on counsel constituting “reasonable cause” for delinquent estate tax return filings.

In *Estate of Frank Duttenhofer*,<sup>153</sup> the tax court also made quite clear its approval of the *Ferrando* reasoning. In *Duttenhofer*, the decedent named two co-executors in his will, only one of whom had any degree of business experience. The experienced individual knew an estate tax return would be due, although he did not know when.<sup>154</sup> The executors hired an attorney (requested by the decedent in his will) who in turn had them sign an “Estate Tax Preliminary Notice.”<sup>155</sup> The notice contained a sentence in bold type stating how many months from death the return would be due.<sup>156</sup> The record is clear that the attorney controlled the entire administration of the estate.<sup>157</sup> Unfortunately, the estate tax return was filed more than five months late.<sup>158</sup> A request for an extension was made, but was denied because it was made and received after the due date of the return.<sup>159</sup> It was not until after the extension

152. 315 F. Supp. at 396 (citing *Ferrando*, 245 F.2d at 589). For a detailed discussion of *Ferrando*, see *supra* notes 133-40 and accompanying text.

153. 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969).

154. 49 T.C. at 201-02. One of the executors, William, was the 77-year-old brother of the decedent and a factory worker with only four years of formal education. *Id.* at 201. The other executor, Albert, was 38 years of age, a high school graduate, and the president of the company which decedent had controlled, and at which William had worked for over 20 years. *Id.* at 201-02. While neither had previously been an executor or administrator of an estate, Albert had some minimal knowledge of his obligations. *Id.*

155. *Id.* at 202. The attorney, who had been decedent's legal consultant for 10 years, drafted this Form 704 Tax Notice and had each of the executors sign it. *Id.* For a discussion of Form 704, see *supra* note 151.

156. 49 T.C. at 202. The court stated that within one and one half inches of the executors' signatures on the document, the following statement appeared: NOTICE—Failure to file a required return on Form 706 within 15 months from the date of death may render executors, administrators and persons in actual or constructive possession of the decedent's property liable for penalties.

*Id.*

157. *Id.* at 202-03. The court noted that the attorney made the policy decisions and performed all other work for the estate including handling the matters pertaining to estate taxes and income taxes. *Id.* at 203. The court stated that the attorney also represented the estate in litigation, which included disposition of the proceeds from a life insurance policy, State of Ohio taxes on certain mortgages, and a petition filed by the decedent's surviving spouse. *Id.*

158. *Id.*

159. *Id.* The estate tax return was due on May 22, 1964, and the request for an extension of time for filing was not made until September 16, 1964. *Id.* A relevant treasury regulation provides that any taxpayer desiring an extension for filing a return must request the extension on or before the due date of the return. See Treas. Reg. § 1.6081-1(b) (1960).

request that the executors became aware of the due date of the return and of the fact that it was late. In attempting to have the penalty abated the taxpayers claimed that their reliance on counsel constituted "reasonable cause."<sup>160</sup>

In holding against the taxpayers, the court made clear that, unlike the petitioners, ordinary and prudent businessmen would not abdicate their responsibilities and blindly acquiesce to all of the directions of counsel.<sup>161</sup> Particularly disconcerting was the executors' failure to inquire into the duties put upon them by dint of their position<sup>162</sup> and the knowledge, presumed if not actual, that a return was due. Citing *Ferrando*, the court emphasized that executors must accept the responsibility to some degree of monitoring their attorneys' actions and cannot be considered prudent where they fail to discover the filing requirements of a return known to be due.<sup>163</sup> The court seemingly transformed these responsibilities into a standard for determining "ordinary business care and prudence." Since petitioners failed to meet the standard, their delinquency was without "reasonable cause."<sup>164</sup>

After deciding that the taxpayers had not established their case, the court went on to discuss petitioners' contention that reliance on counsel is reasonable cause as a matter of law. The cases cited for support of that contention were distinguished on the ground that the taxpayers there had no knowledge that returns were required.<sup>165</sup> In the instant case the issue was "when" and not "whether" to file. The distinction appears crucial to the analysis, but its importance was quickly diminished by the court's subsequent comment, which in effect posited that reliance on counsel

160. 49 T.C. at 204.

161. *Id.*

162. *Id.* Although the court does not enumerate a list of duties imposed upon an executor, it does make clear that ascertaining the due date is one of those duties. *Id.*

163. *Id.* at 205 (citing *Ferrando*, 56-2 U.S. Tax Cas. (CCH) ¶ 11,615 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957)). For a discussion of *Ferrando*, see *supra* notes 133-40 and accompanying text.

164. 49 T.C. at 206-07.

165. *Id.* at 205. The petitioners relied on the following cases: *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Orient Inv. & Finance Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947); *Brooklyn & Richmond Ferry Co.*, 9 T.C. 865 (1947), *aff'd*, 171 F.2d 616 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949); *Safety Tube Corp. v. Commissioner*, 8 T.C. 757 (1947), *aff'd*, 168 F.2d 787 (6th Cir. 1948). The *Duttenhofer* court noted that in each of these cases the taxpayers were without knowledge that the tax returns were required. 49 T.C. at 205. Instead, the taxpayer relied on counsel's advice that no return was required to be filed. *Id.*

will not constitute "reasonable cause" if the taxpayer "should know a return is required."<sup>166</sup> Although further clarification of the use of "should" is not provided, based upon the court's earlier discussion of executors' minimal responsibilities, it seems that executors "should" always ascertain if a return is required.<sup>167</sup> Thus, it can be argued that *Duttenhofer* sets forth a per se rule that reliance on counsel is not "reasonable cause" for delinquent filings of estate tax returns.

Although not openly taken to this extreme, *Duttenhofer* illustrates the strict tenor of the tax court's view on the issue. Its opinion in the *Estate of Lammerts v. Commissioner*,<sup>168</sup> although relating to an executor's duty to file an income tax rather than an estate tax return, is illustrative. In *Lammerts*, the executor retained the decedent's accountant to prepare the decedent's personal tax returns and hired an attorney to file the estate tax return.<sup>169</sup> The executor was unaware that the estate was also required to file an income tax return and, despite having both an attorney and accountant on hand, was not advised of this fact.<sup>170</sup> The court held that ignorance of the filing requirement did not constitute reasonable cause even though the executor seemingly relied on advisors

166. 49 T.C. at 205. The court stated:

It is our opinion that where a taxpayer should know a tax return is required (and here Albert did know that a tax return was required), but delegates the responsibility of preparing and filing the return to a third person, the delegate's subsequent failure in this appointed task does not alone constitute reasonable cause for failure to file on time under section 6651.

*Id.* (citing *Logan Lumber Co. v. Commissioner*, 365 F.2d 846, 854 (5th Cir. 1966); *Southeastern Finance Co. v. Commissioner*, 153 F.2d 205 (5th Cir. 1946); *Estate of Mayer*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966)).

167. 49 T.C. at 205. For a discussion of the executors' minimal responsibilities, see *supra* notes 162-63 and accompanying text.

168. 54 T.C. 420 (1970), *aff'd in part and remanded in part*, 456 F.2d 681 (2d Cir. 1972).

169. 54 T.C. at 428. No specific instructions were given to the accountant by the executor. *Id.* In fact, the accountant never received access to some of the records maintained by the attorney hired to file the estate tax returns. *Id.* The court thus held that any belief by the executor, under these circumstances, that the accountant would handle the preparation of all necessary tax returns of the estate, "cannot be regarded as reasonable." *Id.* at 446.

170. *Id.* at 429. The executor argued that he had never acted in the capacity of an executor prior to this instance and therefore had no knowledge of what tax returns had to be filed. *Id.* The accountant retained to prepare the decedent's personal tax returns eventually discovered that the fiduciary income tax return had not been filed and immediately informed the executor of his duty to file such a return. *Id.* The return was then prepared by the accountant, but it was not filed until seven months after the statutory filing deadline. *Id.*

to apprise him of the necessity of filing the return.<sup>171</sup> The executor was held to have an affirmative duty to ascertain his responsibilities of office and merely thinking he had executed what he believed to be his duties was insufficient.<sup>172</sup> The court found that the executor never inquired into what his duties were. The failure to determine one's duties was held to be neither ordinary "nor prudent" conduct and precluded a finding of "reasonable cause."<sup>173</sup> The court, however, did note that filing an estate income tax return is neither complicated nor unusual, and left room for limiting its holding to matters of similar ilk.<sup>174</sup> Unfortunately, the filing of an estate tax return would probably be considered equally, if not more, basic than the estate income tax return were the issue ever brought before the court.

On appeal,<sup>175</sup> the penalty issue was given short shrift. The tax court decision was affirmed because "executors [are] charged with the responsibility of making inquiry in the exercise of 'ordinary business care and prudence.'" <sup>176</sup> "Passivity," the court concluded, cannot be the basis of reasonable cause.<sup>177</sup> Of particular interest was the distinction drawn between *Haywood Lumber* and

171. *Id.* at 446. The court acknowledged that the executor's lack of knowledge as to his obligations as executor was due to his inexperience. *Id.* However, the court held that inasmuch as the executor was without knowledge as to his duties, he had an affirmative duty to seek advice from either his accountant or attorney as to what federal tax returns were required. *Id.*

172. *Id.* at 446. The court rejected the executor's argument that he reasonably relied upon his accountant and attorney for preparation of all necessary tax returns. *Id.* As to the accountant, the executor never discussed estate matters with him and in fact the books and records at the estate were maintained by the attorney. *Id.* Additionally, the accountant testified that the majority of his work for the decedent's family dealt with repeat returns and the accountant stated that he did not anticipate that his office would be required to prepare the fiduciary income tax return. *Id.* With respect to the executor's attempt to demonstrate reliance upon his attorney, the court stated that the executor had an affirmative duty to ask the attorney what returns were necessary. *Id.* While the court recognized that this oversight by the executor was probably in good faith, the court found no basis for a holding that the executor's inadvertance was reasonable. *Id.* at 447.

173. *Id.* at 446. The court said that the executor "had a positive duty to ascertain the nature of his responsibilities as such. The fact that he, in good faith, believed that he had done all that was required of him when the estate tax return was filed is not an excusable circumstance." *Id.* (citing *Fides v. Commissioner*, 137 F.2d 731 (4th Cir.), *cert. denied*, 320 U.S. 797 (1943)).

174. 54 T.C. at 446 (citing R.A. Bryan, 32 T.C. 104, 133 (1959) (reliance by taxpayer upon professional advice may constitute reasonable cause where matter involved is "complicated and unusual, justifying such reliance")).

175. *See* 456 F.2d 681 (2d Cir. 1972).

176. *Id.* at 683 (quoting Treas. Reg. § 301-6651-1(a)(3) (1985)).

177. *Id.*

*Lammerts*.<sup>178</sup> The court felt that the taxpayer's direction to counsel in the former case that all necessary returns be filed coupled with his supplying of relevant information was quite different from the passivity on the part of Lammerts' executor.<sup>179</sup> It is suggested that this distinction is indeed fuzzy. How can one seriously contend that there is a difference between a taxpayer who directs his counselor to file all necessary returns and one who retains counsel to handle all aspects of administering the estate? Unless the executor explicitly expresses a desire not to have the return filed or willfully withholds necessary information, is he not, investing counsel with full authority to handle all matters that the executor is directing, implicitly directing that all necessary tasks, including filing returns, be performed? It seems too much emphasis may be placed on a simple choice of words. Specifically, if the executor directs that all tax returns be filed, a late filing could be spared penalty under *Haywood Lumber*;<sup>180</sup> but if the executor obtains counsel for handling all aspects of the estate and fails to identify the particular act of filing a return he may be considered passive and not entitled to relief. The disposition of these cases ought not to rest on such questionable distinctions.

Notwithstanding its objectionable nature, this line of reasoning has taken hold in the other circuits. In *Millette & Associates, Inc. v. Commissioner*,<sup>181</sup> for example, the Fifth Circuit stated that "it is well established that reliance on tax advisors is not reasonable cause for failure to file a return on time; the responsibility for assuring a timely filing is the taxpayer's."<sup>182</sup> By imposing upon the taxpayer the onus of "assuring" that the return is filed, the

178. For a detailed discussion *Haywood Lumber*, see *supra* notes 88-108 and accompanying text.

179. 456 F.2d at 683 (citing *Haywood Lumber v. Commissioner*, 178 F.2d 769 (2d Cir. 1950)). In *Haywood Lumber*, a corporate officer gave directions to counsel that all necessary information be supplied to the accountant and that all necessary tax returns be filed. 178 F.2d 771. The *Haywood Lumber* court emphasized that the executor had not "awaited passively for such tax advice." *Id.* Rather, the court noted, "he affirmatively requested the preparation by his consultant of proper returns." *Id.*

180. 178 F.2d at 771. The court in *Haywood Lumber* held that if an executor supplies counsel with "all necessary information, and requests him to prepare proper tax returns [he] has done all that ordinary business care and prudence can reasonably demand." *Id.* (emphasis added).

181. 594 F.2d 121 (5th Cir.), *cert. denied*, 444 U.S. 899 (1979).

182. 594 F.2d at 125 (citing *Logan Lumber Co. v. Commissioner*, 365 F.2d 846, 854 (5th Cir. 1966)). The court in *Millette* emphasized that the corporation's president in that case did not "take steps to ensure that the return was filed." *Id.* at 125. In fact, the president testified that he had "no recollection of receiving the return from the preparer or of signing and filing it." *Id.* at 123.



court seems to be accepting the view that passivity after turning the matter over to counsel is insufficient activity to establish "reasonable cause." Although in *Millette* a consolidated corporate tax return was in issue, it seems fair to conclude that the same standard would be applicable to executors and their obligation to file estate tax returns.<sup>183</sup>

A similar position was adopted by the Eighth Circuit in *Estate of Lillehei*.<sup>184</sup> There the court affirmed the tax court's holding that an executor's duties include both ascertaining the due date of the estate tax return and seeing that the attorney files it on time.<sup>185</sup> The tax court's opinion was, in effect, incorporated into the decision, further evidencing acceptance of the "personal, nondelegable duty" theory.<sup>186</sup> The *Lillehei* holding that the duty to file an estate tax return is a personal, nondelegable duty has been cited as controlling in the Eighth Circuit.<sup>187</sup>

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183. 594 F.2d at 123. In *Millette*, the principal corporation (Millette) and its subsidiary had never filed a consolidated return for any year prior to 1972. *Id.* Therefore, regulations required that Millette's 1972 consolidated corporate tax return be filed not later than March 15, 1975. *Id.* (citing I.R.C. § 6072(b) (1972)). Millette, however, did not file its return until May 9, 1975. 594 F.2d at 123. The court held Millette liable for a 25% addition to its tax, the maximum addition allowable. *Id.* at 121.

The key determination is not the type of the tax return which must be filed, but whether the taxpayer was aware of the requirement to file. *See United States v. Kroll*, 547 F.2d 393, 396 (7th Cir. 1977). In *Kroll*, the court distinguished cases in which no penalty was imposed because there was good faith reliance on counsel as to whether a return had to be filed. *Id.* The court stated that these cases "do not sanction an abdication of responsibility for the timely filing of a return admittedly due." *Id.* *See also Boyle v. United States*, 105 S. Ct. 687 (1985) (obligation on executor to ascertain and meet statutory deadline, and failure to meet deadline is not excused by taxpayer's reliance on agent); *Fleming v. United States*, 648 F.2d 1122 (7th Cir. 1981) (executor who knew estate tax return had to be filed and knew due date could not rely on attorney to perform executor's duties).

184. 638 F.2d 65 (8th Cir. 1981).

185. *Id.* at 66 (citing *Estate of Lillehei*, 48 T.C.M. (P-H) ¶ 79,464 (1979)).

186. 638 F.2d at 66. After reviewing the facts, the court stated: "We affirm the judgment of the tax court on the basis of that court's opinion." *Id.* It should be noted that the court mentioned that the executor here had previously served as executor of another estate, but it is not clear whether the court considered this fact to be particularly significant. *Id.* The opinion speaks in terms of the personal and nondelegable duty of executors generally; thus the relative experience of the executor in *Lillehei* to the duties of his title apparently was not dispositive. *Id.*

187. *See Estate of Kerber v. United States*, 717 F.2d 454 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 955 (1985) (executrix's reliance on incorrect advice from counsel as to due date of return does not constitute reasonable cause); *Smith v. United States*, 702 F.2d 741 (8th Cir. 1983) (*per curiam*) (reliance by personal representative on mistaken advice of counsel does not constitute reasonable cause); *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981) (executor has

The Sixth Circuit, despite its earlier holding in *Fisk*, has for the most part also accepted the *Duttenhofer* rationale, but in a tempered way. In *Estate of Geraci*<sup>188</sup> the court affirmed the tax court's conclusion that the taxpayer's reliance on counsel did not constitute "reasonable cause," but did so because the findings of the record were not clearly erroneous.<sup>189</sup> The tax court's determination regarding the taxpayer's passivity was criticized,<sup>190</sup> and the court expressed sympathy for the plight of the taxpayer who was put in such an untenable position.<sup>191</sup> Nonetheless, the "passivity" viewpoint of *Duttenhofer* seemed to be acceptable to the court. Subsequently, however, in *Bank of Benton v. United States*,<sup>192</sup> the United States District Court for the Western District of Kentucky, although finding in favor of the IRS, interpreted *Geraci* as strongly indicating that "reliance upon advice of counsel, under proper circumstances, can constitute reasonable cause for delayed filing of an estate tax return."<sup>193</sup> While the *Benton* court admitted that the status of this issue in the Sixth Circuit is unclear,<sup>194</sup> and made reference to taxpayer successes when the *Geisen* tests were met,<sup>195</sup>

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personal, nondelegable duty to file timely return and reliance on mistaken advice of counsel is not sufficient to constitute reasonable cause).

188. 502 F.2d 1148 (6th Cir. 1974).

189. *Id.* at 1149 (citing *In re Fisk's Estate*, 203 F.2d 358, 359 (6th Cir. 1953)). The *Geraci* court stated that "although we affirm, we do so unenthusiastically." *Id.* The court noted that the burden is on the taxpayer to demonstrate that the failure to timely file a return was due to reasonable cause. *Id.* The court stated that absent such a showing, the court is required to impose the additional tax. *Id.*

190. *Id.* In addition, the court recognized that the executrix was a housewife with little or no business experience, and indicated that criticizing her for her passivity was unwarranted under the circumstances. *Id.*

191. *Id.* at 1150. The court stated: "Although we are sympathetic with the plight of the executrix and would have preferred that the IRS have [sic] settled this matter at the administrative level and thereby avoided a harsh result, we cannot reverse the decision of the Tax Court on the record before us." *Id.*

192. 84-2 U.S. Tax Cas. (CCH) ¶ 13,582 (W.D. Ky. 1984).

193. *Id.* The court indicated that "proper circumstances" exist where "inexperienced taxpayers, unaware of the need to file a return or at least the date the return is due, select a competent tax expert, supply the tax expert with all the necessary information and rely upon the expert to timely file any necessary returns." *Id.* The court noted that, in *Benton*, the executor was a bank whose trust office was aware that a federal estate tax return would be necessary. *Id.* In fact, the trust office was aware that it could obtain a filing extension. *Id.* These factors outweighed the fact that the bank had a small trust office that handled only a few estates. *Id.*

194. *Id.* The court stated: "Although there is no clear resolution of the question in the Sixth Circuit, there are strong indications that, in this Circuit, reliance upon advice of counsel, under proper circumstances, can constitute reasonable cause for delayed filing of an estate tax return." *Id.* (citations omitted).

195. See *Estate of Duttenhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969) (*per curiam*) (neither litigation against estate nor

there is nothing concrete in the opinion to grasp onto as strong support for a pro-taxpayer position. Perhaps if the taxpayer in *Benton* were not a professional executor a different result would have been reached, but there is no clear indication as such. The Sixth Circuit could probably comfortably be placed in the camp with those circuits which have adopted the harder line position.<sup>196</sup>

### C. *A Walk Through the Seventh Circuit*

The history of the "reliance on counsel" issue within the Seventh Circuit is sufficiently interesting to warrant separate examination. The decisions have been diverse, if not, at times, patently inconsistent. This is the circuit that produced *Geisen*,<sup>197</sup> albeit on the trial level, on the one hand, and *Knoll v. United States*,<sup>198</sup> one of the most frequently cited anti-taxpayer holdings, on the other. Almost all of the judicial frustration in wrestling with this issue can be found in opinions of this circuit. By tracing cases up to *Boyle*, itself a Seventh Circuit case, the full scope of the problem is brought into focus.

In the relatively early case of *Commissioner v. American Association of Engineers Employment, Inc.*,<sup>199</sup> the Seventh Circuit took its lead from the pre-*Millette* Fifth Circuit and followed the position laid down in *Burton Swartz Land Corp. v. Commissioner*.<sup>200</sup> In *Engineers Employment*, it was stipulated that taxpayer's counsel was a tax specialist with significant experience in the tax field.<sup>201</sup> Based upon counsel's opinion, a corporate tax return was not filed.<sup>202</sup>

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executor's reliance upon attorney constitute reasonable cause); *Estate of Geraci v. Commissioner*, 502 F.2d 1148 (6th Cir. 1974) (executrix's inexperience in business and her reliance on her attorney's mistaken belief as to period for filing return constituted reasonable cause), *cert. denied*, 420 U.S. 992 (1975).

196. See *Boyle v. United States*, 105 S. Ct. 687, 691 n.5 (1985). The Supreme Court stated:

Although at one point the Sixth Circuit Court of Appeals held that reliance on counsel could constitute reasonable cause . . . the Sixth Circuit appears now to be following those courts that have held that the taxpayer has a nondelegable duty to ascertain the deadline for a return and ensure that the return is filed by the deadline.

*Id.* (citations omitted).

197. *Geisen v. United States*, 369 F. Supp. 33 (W.D. Wis. 1973). For a discussion of this case, see *supra* notes 117-22 and accompanying text.

198. 547 F.2d 393 (7th Cir. 1977).

199. 204 F.2d 19 (7th Cir. 1953).

200. 198 F.2d 558 (5th Cir. 1952).

201. 204 F.2d at 20. The court found that counsel for the corporate taxpayer had specialized in federal taxation for more than 25 years. *Id.* In that time, the attorney had been counsel in more than 100 tax cases in the Supreme Court and other federal courts. *Id.*

202. *Id.* The tax court found that the taxpayer's attorney had submitted a

The court noted that a reputable and experienced attorney would not render an opinion without possessing all of the necessary facts.<sup>203</sup> It then concluded that the taxpayer had done all that could reasonably be expected and eliminated the penalty.<sup>204</sup> The case clearly falls into the category of finding reasonable cause when reliance on counsel is used to determine whether a return is due.<sup>205</sup> But the court's view that counsel would not normally proceed without sufficient information is noteworthy. It is the first instance of a court putting the onus on the putative expert, tax counsel, to do the job he was hired to do. The court permits the presumption that if counsel made the decision he took all the necessary steps a trained professional would take, including obtaining all relevant information. The implication is that a taxpayer can meet his obligation by merely following instructions and complying with requests and need not actively inquire into the needs of counsel. Thus, the court seemingly holds that pas-

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written opinion to the taxpayer in which he advised the taxpayer that the corporation was exempt and therefore not required to file federal tax returns. *Id.*

In court, a witness who had been associated with the corporate taxpayer for 25 years testified that no corporate tax return was filed because he and the corporate taxpayer were advised by their counsel that a return was not required. *Id.* at 21. The witness also testified that he thought that counsel had stated this opinion in writing, but the alleged written opinion could not be found. *Id.*

While the court noted that the testimony as to the written opinion was "rather meager," the court also stated that "there was no denial of it in any way." *Id.*

203. *Id.* Counsel for the IRS contended that the attorney's opinion could be held to be no more than an "informal opinion," and as such, should not have been relied upon by the taxpayer. *Id.* In support of this opinion, counsel noted that the alleged written opinion of the taxpayer was not produced as evidence and that there was no evidence submitted as to what information the taxpayer had given to the attorney. *Id.* The court, however, held that whether the attorney's opinion was written or verbal, it would not have been rendered by an experienced tax attorney unless the attorney was in possession of the determinative facts. *Id.*

204. *Id.* The court cited the Second Circuit's decision in *Haywood Lumber* for the proposition that "[w]hen a corporate taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand." *Id.* (citing *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950)). For a further discussion of *Haywood Lumber*, see *supra* notes 88-111 and accompanying text.

205. See *Boyle v. United States*, 105 S. Ct. 687 (1985). In *Boyle*, the Supreme Court held that a taxpayer's failure to make a timely filing of a tax return is not excused by reliance on an agent of the taxpayer. *Id.* However, in deciding *Boyle*, the Court recognized that reliance upon an attorney as to whether a return was due could constitute reasonable cause. *Id.* at 693 (citing *Engineers Employment*, 204 F.2d 19; *Burton Swartz*, 198 F.2d 558).

For a further discussion of *Boyle*, see *infra* notes 285-308 and accompanying text.

sivity is not inconsistent with the exercise of ordinary and prudent care.

Another taxpayer victory followed in *Geisen*,<sup>206</sup> which, notably, did not rise to the appellate level. Shortly thereafter, however, the Seventh Circuit reversed its sails and charted a new pro-government course in *Kroll v. United States*.<sup>207</sup> *Kroll* involved a knowledgeable taxpayer (the executor had a college education, one year of law school, and broad business experience) who entrusted the administration of the estate, including the filing of tax returns, to an experienced tax attorney.<sup>208</sup> The executor received notice from the Government that the return was overdue, yet the return was not filed until some ten months later.<sup>209</sup> Based upon these facts the court had little difficulty in holding that the taxpayer had not exercised ordinary and due care and thus had failed to establish reasonable cause.<sup>210</sup>

The more important aspect of *Kroll* is the rationale and tenor of the decision rather than the specific holding. Although *Kroll*'s district court opinion was not published, it appears that the *Geisen* test was applied by the trial court in its finding for the taxpayer.<sup>211</sup>

206. *Geisen v. United States*, 369 F. Supp. 33 (W.D. Wis. 1973). In *Geisen*, the court held that for a taxpayer to meet the "reasonable cause" standard, he must: 1) be unfamiliar with tax law; 2) have made a full disclosure of all relevant facts to counsel; and 3) have exercised ordinary business care and prudence. *Id.* at 35-36. For a detailed discussion of *Geisen*, see *supra* notes 117-22 and accompanying text.

207. 547 F.2d 393 (7th Cir. 1977).

208. *Id.* at 394-95. The taxpayer had filed his own income tax returns for many years. *Id.* The taxpayer had also worked with a large industrial company and a brokerage firm. *Id.* at 394.

209. *Id.* at 395. The return was due on October 13, 1965. On January 9, 1969, the IRS sent a letter to the taxpayer advising him that no return had been filed. Additionally, the letter informed the taxpayer of possible methods of avoiding the potential tax penalty. After the taxpayer informed his attorney of the notice from the IRS, the attorney sent a letter to the IRS, as well as a copy of the letter to the taxpayer, informing the IRS that the return would be filed by April 1, 1969. *Id.* at 395-96. However the return was not filed until October 27, 1969. *Id.* at 395.

210. *Id.* at 396. The Seventh Circuit disagreed with the district court's conclusion that the taxpayer had relied, in good faith, upon his attorney. The Circuit court stated that the taxpayer knew he had not signed an estate return nor written a check to pay the tax despite the fact that the taxpayer was aware of both of these obligations. Therefore, the court held that the taxpayer must have realized that the return had not been filed by the April 1 deadline as had been promised to the IRS. *Id.*

211. *Id.* at 395. As was previously noted, the *Geisen* test consists of three conditions, all of which must be met before the taxpayer is considered to have had "reasonable cause." *Geisen v. United States*, 369 F. Supp. at 36. For a list of these conditions, see *supra* note 206. For a detailed discussion of *Geisen*, see *supra* notes 117-22 and accompanying text.

The appellate opinion noted the lower court's finding that the taxpayer (1) made full disclosure to his attorney, and (2) did not possess estate tax expertise—two of the three conditions of the *Geisen* test.<sup>212</sup> The question of whether complete compliance with *Geisen* would have permitted elimination of the penalty was never answered. The court noted that the executor had received actual notice of the return's due date (a violation of the third condition of the *Geisen* test) and failed to file before the maximum penalty accrued.<sup>213</sup> The court could have based its holding on the simple fact that since the *Geisen* tests had not been satisfied, the taxpayer failed to establish reasonable cause. Instead, it went two steps further. First, it adopted the *Ferrando-Duttenhofer* position that the executor's duty to file an estate tax return is personal and nondelegable,<sup>214</sup> but limited its application to those situations where there is no question that a return is due.<sup>215</sup> Second, it noted that to the extent *Geisen* was inconsistent with this position, that case was incorrect.<sup>216</sup> Accordingly, *Geisen* would still be applicable to those factual settings where reliance on counsel led taxpayers to

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212. 547 F.2d at 395. Although the first two conditions of the *Geisen* test were met, the Seventh Circuit in *Kroll* stated that "[t]he sole issue is Kroll's knowledge of the filing date and his failure to file on time." *Id.* This is the third condition of the *Geisen* test. For a discussion of the *Geisen* test, see *supra* note 206.

213. For a discussion of the taxpayer's failure to timely file, see *supra* notes 209-10 and accompanying text.

214. See *Duttenhofer*, 410 F.2d at 306; *Ferrando*, 245 F.2d at 589. For a discussion of *Ferrando*, see *supra* notes 133-42 and accompanying text. For a discussion of *Duttenhofer*, see *supra* notes 153-67 and accompanying text.

215. 547 F.2d at 396. The *Kroll* court stated:

Whether or not the taxpayer is liable for taxes is a question of the tax law which often only an expert can answer. The taxpayer not only can, but must, rely on the advice of either an accountant or a lawyer. This reliance is clearly an exercise of ordinary business care and prudence.

*Id.*

The court then proceeded to distinguish the question of whether a return is required from the question of when the return is due. *Id.* With respect to the latter issue the court held:

An entirely different situation is presented where a penalty is assessed because a return, although filed, is filed after the due date . . . any layman with the barest modicum of business experience knows that there is a deadline for the filing of returns and knows that he must sign the return before it is filed. If, in addition, the taxpayer in a given case knows the exact date of the deadline, then the failure of his attorney or accountant to present him with the return for his signature before that date must put him on notice that reliance on the attorney or accountant is not an exercise of ordinary business care and prudence.

*Id.*

216. *Id.* at 397 n.3. For a detailed discussion of *Geisen*, see *supra* note 117-22 and accompanying text.

believe, in error, that no return was due, thus triggering satisfaction of all of the *Geisen* tests. The court accepted reliance on counsel as reasonable cause in such cases, citing with approval *Hatfried* and *Burton Swartz*, but made clear that it did not read them as authority for the permissibility of "abdication of responsibility for the timely filing of a return admittedly due."<sup>217</sup>

Since *Kroll* limits successful "reliance on counsel" arguments to those instances where the advisor speaks only to the necessity of filing a return, it could be concluded that this defense to the assessment of delinquency penalties would almost never be available.<sup>218</sup> Such a conclusion is warranted if *Kroll* is viewed in conjunction with those cases imposing an affirmative duty on the executor to ascertain the due dates of any returns required to be filed on behalf of the estate.<sup>219</sup> Only in those instances where the estate attorneys were basically ignorant of the law could abatement of the penalty be had.<sup>220</sup>

Those who thought *Kroll* represented the Seventh Circuit's abandonment of "reliance on counsel" as reasonable cause were, however, quickly forced to reconsider when the court decided *Rohrbaugh v. United States*.<sup>221</sup> *Rohrbaugh* was an appeal from summary judgment granting the taxpayer a refund of assessed penalties. The undisputed facts included, predictably, a relatively unsophisticated executor unfamiliar with both estate and tax matters who entrusted the administration of the estate to her attorney.<sup>222</sup> The taxpayer made full disclosure of all material matters

217. 547 F.2d at 397 (citing *Burton Schwartz*, 198 F.2d 558; *Hatfried*, 162 F.2d 628).

218. See *Kroll*, 547 F.2d at 397. The *Kroll* court held that "[i]n the cases holding that no penalty may be imposed because of good faith reliance on counsel, the question was whether a return had to be filed." *Id.*

219. See, e.g., *Estate of Lillehei*, 638 F.2d 656 (8th Cir. 1981) (executor's duties include ascertaining due date of estate tax return and seeing that attorney files return on time); *Millette & Assoc. v. Commissioner*, 594 F.2d 121 (5th Cir.) (responsibility for assuring timely filing belongs to taxpayer), *cert. denied*, 444 U.S. 899 (1979). For a further discussion of *Millette* and *Lillehei*, see *supra* notes 181-87 and accompanying text.

220. See *Kroll*, 547 F.2d at 396. The court states that whether a taxpayer is liable for taxes, and thereby required to file a return, is a question of law. The *Kroll* court further states that often this question of whether to file can only be answered by an expert (i.e., an attorney or an accountant), and concludes that, on this question of whether to file, the taxpayer is justified in relying upon the attorney or accountant. Therefore, if the attorney or accountant informs the taxpayer that no return is necessary but the court determines that the attorney was mistaken and that a return was required, the taxpayer will not be liable. *Id.*

221. 611 F.2d 211 (7th Cir. 1979).

222. *Id.* at 212. The taxpayer was a high school graduate but had no college or other advanced education. The taxpayer worked as a receptionist tele-

to her attorney and inquired of his progress, but never knew the exact due date of the estate tax return.<sup>223</sup> In affirming the decision to grant summary judgment the court offered some interesting observations.

First, and perhaps foremost, was the *Rohrbaugh* court's ability to distinguish *Kroll* and conclude that it was correctly decided. The controlling distinction was the fact that in *Kroll* the executor had actual notice of the due date of the return whereas that knowledge was absent in *Rohrbaugh*.<sup>224</sup> The court was willing to apply the *Geisen* tests to determine whether the taxpayer exercised ordinary care,<sup>225</sup> and refused to view *Kroll* as establishing a per se rule prohibiting reliance on counsel from ever giving rise to reasonable cause.<sup>226</sup> Unfortunately, despite the fact that it downplayed *Kroll*, the court never addressed the *Kroll* holding regarding the executor's personal, nondelegable duty to ascertain the due date of and file the estate tax return. This major omission forces one to question whether the court truly believed *Kroll* could be reconciled with decisions permitting executors to avoid delinquency penalties for entrusting counsel to file tax returns. The court's reading of the *Kroll* footnote<sup>227</sup> that dismisses *Geisen*

phone operator at a hospital and had no experience in business matters. The law firm hired by the taxpayer had prepared her father's tax returns for many years, and the attorney handling the administration of the estate had been practicing in the field of tax law for almost thirty years. *Id.*

223. *Id.* The taxpayer had never before acted as a personal representative of an estate. The court stated that the taxpayer had "frequently discussed with [her attorney] the progress and status of the probate proceedings." *Id.* The attorney continually assured the taxpayer that estate matters were progressing accordingly. In fact, upon the attorney's realization of his failure to file the federal estate tax return, he informed the taxpayer of the oversight and admitted responsibility for the error. *Id.* at 213. The return was finally filed three months and one day after its due date. *Id.*

224. *Id.* at 216. The court stated that "the *Kroll* case is clearly distinguishable from the present situation . . . the taxpayer here had no business experience that would reveal to her that there is a deadline for the filing of estate tax returns." *Id.* The court noted that, even more importantly, "the taxpayer in this case had no knowledge of exactly when the return was due." *Id.*

225. *Id.* The *Rohrbaugh* court found *Geisen* to be factually distinguishable from *Kroll*. *Id.* (citing *Kroll*, 547 F.2d 393; *Geisen*, 369 F. Supp. 33). In fact, the court contended that *Geisen* was factually on point with *Rohrbaugh*, as both *Geisen* and *Rohrbaugh* involved inexperienced taxpayers who had no knowledge of business affairs or of the filing deadlines for the returns. *Id.* The court pointed out that the taxpayer in *Rohrbaugh* filed within four days of learning of his failure to timely file, while the taxpayer in *Kroll* took 10 months to file after learning of the return's due date. *Id.*

226. *Id.* at 217.

227. See *Kroll*, 547 F.2d at 397 n.3. For a further discussion of the *Kroll* court's interpretation of *Geisen*, see *supra* note 216 and accompanying text.



as being incorrectly decided is quite strained.<sup>228</sup> This again raises the question of whether the court was more concerned with finding a way to sustain the trial court because its decision seemed fair, than with applying the harsh rule which the circuit had apparently adopted only a few years earlier.<sup>229</sup> In all, one did not walk away from *Rohrbaugh* with the sense that the Seventh Circuit had assumed the pro-taxpayer stance.

A second notable feature of the *Rohrbaugh* opinion is the court's refreshing outlook on the practicalities at play in the executor-counsel relationship, and the problems associated with drawing technical distinctions that might not exist.<sup>230</sup> There is little question but that the court was quite sympathetic to the plight of the inexperienced executor who seems to be at the mercy of the estate attorney. What can the executor be realistically expected to do beyond furnishing all necessary information requested and inquiring of the progress being made? The court believed such action is sufficient to pass an "ordinary care" test.<sup>231</sup> Additionally, in this setting, the court was hard pressed to differentiate between obtaining technical advice pertaining to whether a return is due from having the counsel actually do the filing, if necessary. If the attorney undertakes the task to prepare and file a return, should an inexperienced executor unaware of when the return is due be held not to have exercised ordinary care in relying on counsel's performance merely because the job to be done does

228. 611 F.2d at 217. The court interpreted *Kroll's* reference to *Geisen* as simply stating that, "to the extent that *Geisen* was subject to an interpretation that reliance upon counsel for timely filing would *always* constitute reasonable cause," the *Kroll* court could not agree with *Geisen*. *Id.* (Emphasis in original).

229. In *Rohrbaugh*, the court distinguished *Geisen* from *Kroll* on its facts. *Id.* at 216. However, it is clear that the *Kroll* court disapproved of the *Geisen* three part test because it was contrary to the nondelegable duty theory. *Kroll*, 547 F.2d at 395. In *Kroll*, the circuit court held that the trial court's finding that two of the three parts of the *Geisen* test were met was irrelevant, stating that "neither fact plays a role" in its decision in *Kroll*. *Id.*

230. 611 F.2d at 212. The court did not focus on whether the taxpayer had ordered counsel to file all necessary returns, only on whether she had made full disclosure of all relevant facts and papers to her attorney. *Id.* Recall that in the past the court had focused on the fact that the taxpayer had not directed counsel to file all necessary returns when supplying the relevant information. See *Lammerts*, 456 F.2d at 683. For a further discussion of *Lammerts*, see *supra* notes 168-80 and accompanying text.

231. 611 F.2d at 214. The court stated that the conduct of the taxpayer would seem to meet any reasonableness standard, but in particular, that the taxpayer's conduct did meet the reasonable cause standard in that there was no "willful neglect." *Id.* In support of this finding, the court emphasized the inexperience of the taxpayer and her diligence in selecting a competent tax specialist. The court also emphasized that the taxpayer had kept in close contact with the tax specialist even after supplying the necessary information. *Id.*

not entail receipt of advice on a technical matter? The court thought not, but did not go so far as to indicate that abdication of responsibility could give rise to a favorable finding for the taxpayer.<sup>232</sup> The executor, it seems, must do more than merely turn over the administration of the estate to the lawyer, a position consistent with the *Geisen* tests. In essence, the court apparently recognized that executors obtain counsel for the purpose of assisting in the administration of the estate.<sup>233</sup> When the assistance includes tax work the executor should be able to expect counsel to carry through on these matters as well. But, although the executor should not be expected to do counsel's work, he must to some degree satisfy himself that the work is being done. It is these latter practicalities that appear to provide the foundation for the court's approach to establishing "reasonable cause."<sup>234</sup>

A third interesting aspect of *Rohrbaugh* is the court's willingness to distinguish the executor's plight from that of other taxpayers. In the opinion is a discussion of the penalty provision and its objective.<sup>235</sup> Reference is made to *Helvering v. Mitchell*,<sup>236</sup> where the United States Supreme Court noted that a purpose of the penalty provisions is to protect revenue and to "reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."<sup>237</sup> The *Rohrbaugh* court noted that such considerations are inapplicable to a situation

232. *Id.* at 219. The court stated that it did not "condone . . . a complete abdication of the responsibility of the taxpayer to keep in touch with his counsel." *Id.* Rather, the court required the taxpayer to acquire a competent tax expert and supply the expert with the necessary information. *Id.*

233. *See id.* at 213. The court in *Rohrbaugh* noted the role played by counsel in the sale of farm land owned by the estate and other efforts made by counsel in an attempt to aid the administration of the estate. *Id.*

234. *See id.* at 214. The court emphasized that the taxpayer "maintained contact with [the attorney] from time to time during the administration of the estate." *Id.* Also, the court observed that it did not appear that the Government was claiming "willful neglect" by the taxpayer. Moreover, the court distinguished the filing of an estate tax return from that of an income tax return on the basis of the widespread media efforts to give notice of the due date of income tax returns. *Id.*

235. *Id.* at 218 (citing *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941)). In *Plunkett*, the court noted that if a return is executed properly and filed before the deadline, no penalty will be assessed, even if the Government subsequently finds the return to be incorrect as to the amount of taxable income. 118 F.2d at 650.

The penalty assessed by the Government equals five percent for each full month (or any part thereof) that the return is late. 611 F.2d at 218. The maximum penalty, however, is 25%. *Id.* For a further discussion of the lateness penalty, see *supra* notes 7-27 and accompanying text.

236. 303 U.S. 391 (1938).

237. *Id.* at 401. The *Mitchell* Court stated: "The remedial character of

where the return is late but any prospect of fraud or cost of Government investigation is absent,<sup>238</sup> as the revenue base is sufficiently protected by the interest due for the delinquency period.<sup>239</sup> Aside from the issue of matching the penalty with the evil, the court was mindful of the potential "Pandora's box" that can be opened by permitting taxpayers to use dilatory counsel as a shield from monetary loss. But the court was satisfied that its decision would not encourage delinquent returns since the favorable result in the opinion is limited to narrow facts.<sup>240</sup> Moreover, counsel filing late returns because of their own errors face embarrassment and repercussions from angry clients, which may perhaps lead to self-monitoring and limit the number of delinquencies. Such a view is probably overly idealistic, but this should not detract from its underlying soundness. The bottom line is that an executor is in a different position from many other taxpayers. He is not inculcated with information regarding estate tax return requirements, as income tax filers are with regard to their responsibilities. The *Rohrbaugh* court points out this distinction,<sup>241</sup> and notes that the regulations themselves permit the type of tax involved to be taken into account when determining whether a taxpayer has exercised ordinary care.<sup>242</sup> It seems reasonable that an executor ought not to be presumed to have the same knowledge concerning estate taxes that individuals have

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sanctions imposing additions to a tax has been made clear by this court in passing upon similar legislation." *Id.* at 401 (footnote and citations omitted).

238. 611 F.2d at 218. The court noted that "[t]he record does not even indicate that the Service was aware that there would be a tax owing in this estate." *Id.* The court also noted that there was not interference with the ongoing work of the IRS. *Id.*

239. *Id.* The *Rohrbaugh* court stated: "While it is true, insofar as protecting the revenue was concerned, that the revenue came in after it was due, . . . it was accompanied by interest for the period of delinquency." *Id.*

240. *Id.* at 219. The court limited the holding to situations in which the taxpayer retains a competent tax expert, supplies the tax expert with all necessary information, and requests the tax expert to prepare all necessary tax returns. *Id.*

The court also noted that the expenses of litigation would discourage taxpayers and counsel from becoming careless with respect to the filing deadlines. Finally, the court pointed out that even if the taxpayer is not required to pay the lateness penalty, he still must pay interest on the amount of tax owed, and the interest begins to run from the day the return is due. *Id.*

241. *Id.* at 214. For a further discussion of the differences between income tax filers and estate tax filers, see *supra* note 234 and accompanying text.

242. 611 F.2d at 218 n.2 (citing Treas. Reg. § 301.6651-1(c)(2) (1984)). The Treasury regulations provide: "[I]n determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer failed to pay." Treas. Reg. § 301.6651-1(c)(2) (1984).

with respect to income taxes. The latter is a highly publicized annual event, the former in many instances is a once in a lifetime experience and occurs at a time when the executor may, because of the death of a loved one, not be operating at his or her usual level of efficiency.

The failure to mention the seeming adoption of the executor's nondelegable, personal duty standard is an interesting omission. Even the dissent sidestepped its application, and instead proffered a principal-agent theory to impute the attorney's negligence to the executor and thereby prevent a finding of reasonable cause.<sup>243</sup> The dissent suggests that the majority opinion all but sanctioned dilatory filing and thereby "blunted the salutary objective of the penalty statute."<sup>244</sup> Of greater interest is the expressed concern over the majority's immunization of negligent attorneys from malpractice actions,<sup>245</sup> since by abating the penalty the prospective plaintiff-executor has suffered no harm and therefore has no recoverable damages. The dissent's hard line approach is effectively towing the *Ferrando-Duttenhofer*<sup>246</sup> line presented in *Kroll*; but this should not come as a surprise since the dissenting judge was the only member of the *Rohrbaugh* panel who also decided *Kroll*.<sup>247</sup>

The strength and persuasiveness of *Rohrbaugh* was quickly

243. 611 F.2d at 219-20 (Swygert, J., dissenting). The dissent presumed the taxpayer to be "of normal intelligence and aware of her civic responsibilities." *Id.* The dissent also presumed that had she not hired an attorney she would have been held liable for her failure to make a timely filing of the tax return. *Id.* at 220 (Swygert, J., dissenting). The dissent noted that the taxpayer's sole excuse was her reliance upon her attorney, and that this reliance "proved to be faulty." *Id.* Therefore, the dissent concluded that this reliance could not be "characterized as a reasonable cause" for her late filing. *Id.*

244. *Id.* The dissent stated that "taxpayers and their attorneys will hereafter realize that they shall likely suffer no adverse consequences by late filings of estate tax returns." *Id.*

245. *Id.* The dissent stated that "the court has indirectly but effectively immunized a negligent attorney from what appears to be an open and shut malpractice suit." *Id.* The dissent went on to state that "[p]ublic policy considerations should militate against such immunization." *Id.*

246. See *Duttenhofer*, 410 F.2d at 306; *Ferrando*, 245 F.2d at 589. In *Ferrando*, the court recognized an executor's nondelegable duty to file the estate tax return. 245 F.2d at 589. This nondelegable duty theory was adopted by the court in *Duttenhofer*. 410 F.2d at 306. For a further discussion of *Ferrando*, see *supra* notes 133-42. For a further discussion of *Duttenhofer*, see *infra* notes 153-67 and accompanying text.

247. See *Rohrbaugh*, 611 F.2d at 211; *Kroll*, 547 F.2d at 393. In *Kroll*, the panel included Judges Moore, Swygert, and Tone. 547 F.2d at 393. *Rohrbaugh* was decided by Judges Castle, Pell, and Swygert. 611 F.2d at 211.

tested. In *Fleming v. United States*,<sup>248</sup> a district trial court interpreted *Rohrbaugh* very narrowly, holding against the taxpayer despite the similarity of its facts to that case.<sup>249</sup> The court proceeded to distinguish the cases, but the tenor of the opinion clearly indicates a preference for the *Kroll* rationale of an executor's personal, nondelegable duty to file tax returns, suggesting that the court would have followed *Kroll* even if a distinction could not have been made.<sup>250</sup> There can be no doubt of the court's belief that the *Kroll* principle is correct. This conclusion is supported by the view that despite the burden imposed upon a lay executor to oversee his attorney's activities, the burden is insufficient to overcome the risk of potential loss of revenue and inefficient tax collection.<sup>251</sup> The court was satisfied that neglect or inattentiveness, regardless of which is the true culprit, should not be allowed to increase the Government's time and expense of collecting taxes.<sup>252</sup>

In reviewing *Fleming*, the circuit court reaffirmed *Kroll* as the authoritative case on the issue of reliance on counsel as reasonable cause.<sup>253</sup> Citing *Kroll* extensively, the court noted all of the

248. 483 F. Supp. 284 (E.D. Wis. 1980), *aff'd*, 284 F.2d 1122 (7th Cir. 1981).

249. 483 F. Supp. at 287. As in *Rohrbaugh*, the executor in *Fleming* had no previous experience as a personal representative. *Id.* at 285. Also, the executors in both cases relied completely on counsel to prepare and file the returns, and received assurances that all was in order. *Id.* The only difference appears to be that the executor in *Fleming* had been informed of the due date of the return. *Id.* Apparently the district court felt that this fact placed the case squarely within the *Kroll* rationale. *Id.* at 287.

250. *Id.* With regard to the factual distinction, the court noted: "Even if the plaintiff here did not file the return on time because he relied upon the estate's attorney to file for an extension" there was no reasonable cause. *Id.* The court stated that it was "bound by the holding in *Kroll* and will follow and apply this rule in the present case." *Id.* The *Fleming* court then noted that "[t]here is a sound and valid reason to impose upon the executor the 'personal, nondelegable duty' of promptly filing a request to extend the time for filing estate tax returns." *Id.*

251. *Id.* (citing *Spies v. United States*, 317 U.S. 492, 495 (1943)). In *Spies*, the Court stated that "taxpayers' neglect or deceit may prejudice the orderly and punctual administration of the system as well as the revenues themselves." 317 U.S. at 495.

252. 483 F. Supp. at 287. The United States Supreme Court also addressed this problem in *Spies*. There, the Court stated:

The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of withholding the tax from him by those from whom income may be received. This system can function successfully only if those within and near taxable income keep and render true accounts.

317 U.S. at 495.

253. See 648 F.2d 1122 (7th Cir. 1981).

key language recognizing certain executor duties that cannot be entrusted to estate counsel.<sup>254</sup> The court did not, however, go so far as to adopt a per se rule precluding reliance on counsel from ever constituting reasonable cause, but did limit those instances to situations where the pivotal issue is whether or not a return has to be filed.<sup>255</sup> Interestingly, the taxpayer in *Fleming* tried to navigate into that safe harbor but to no avail.<sup>256</sup>

In a stirring dissent, it was posited that since the taxpayer was informed by counsel that by filing an application for an extension one would be automatically granted, there was reliance on a legal opinion sufficiently similar to involve the exception to *Kroll*.<sup>257</sup> Moreover, the dissent stated that there is no case of record which requires a client to supervise his attorney.<sup>258</sup> Satisfied that the majority failed to demonstrate any specific act which an ordinary and prudent individual would not have done, or would have done differently, the dissent concluded that the court was in effect sanctioning an undeserved windfall for the government.<sup>259</sup>

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254. *Id.* at 1125-26 (citing *Kroll*, 547 F.2d at 396-97). For a discussion of *Kroll*, see *supra* notes 207-19 and accompanying text.

255. 648 F.2d at 1127. The Seventh Circuit stated that "following the decision of this court in *Kroll*, we hold that . . . where the taxpayer knew that an estate tax return must be filed . . . he [has] a personal nondelegable duty to see that . . . the return [is] filed." *Id.*

The court acknowledged that the attorney in *Fleming* was likewise negligent in not filing for an extension of the return or advising the taxpayer of the tax laws concerning the filing of an estate tax. However, the court ruled that the attorney was an agent of the taxpayer and that the taxpayer was charged with his agent's knowledge or lack of it. *Id.*

256. *Id.* The taxpayer argued that he did not know when the return was due because his attorney misinformed him of the due date. *Id.* The court stated that the taxpayer had a nondelegable duty to file an application for an extension and to ascertain that the extension had been granted. *Id.* at 1126-27.

257. *Id.* at 1127 (Cudahy, J., dissenting). The dissent argued that *Kroll* was distinguishable because in *Kroll* the taxpayer had never signed the tax return which he knew was required, whereas in *Fleming* the taxpayer was not required to personally sign the application for the extension of time. *Id.* at 1128 (Cudahy, J., dissenting). The dissent emphasized that the taxpayer could reasonably rely on his attorney to perform this simple, ministerial function. *Id.*

258. *Id.* at 1128 (Cudahy, J., dissenting). The dissent emphasized that the attorney informed the taxpayer that the extension application had been filed. *Id.* The only way the taxpayer could have discovered that the application was not filed would have been to inquire of the attorney's secretary or determine personally whether the attorney's signature was in fact on the documents. *Id.*

259. *Id.* at 1129 (Cudahy, J., dissenting). Justice Cudahy said: [H]ere, the majority points out no specific in which the taxpayer has not acted with "ordinary business care and prudence." Those instances relied on by the majority, majority opinion at 1125, all pertain to matters as to which the taxpayer could reasonably rely on his attorney's "legal opinion." Under these circumstances, the imposition of heavy penal-

*Boyle v. United States*<sup>260</sup> proved to be the capstone case of the circuit. Executor Boyle retained competent counsel to handle the administration of his deceased mother's estate.<sup>261</sup> Boyle knew a tax return would be due, but was not informed of and did not inquire of its due date.<sup>262</sup> The taxpayer 1) was not knowledgeable in the estate field, 2) cooperated with counsel, and 3) inquired into counsel's progress regarding the estate tax return.<sup>263</sup> Ultimately, counsel informed Boyle that due to a clerical error the estate tax return had not been filed, and was by that time overdue. Within a week thereafter Boyle met with counsel again, and a return was filed.<sup>264</sup> The Government assessed the delinquency penalty, and in the action brought by Boyle to obtain a refund both parties moved for summary judgment.<sup>265</sup> Relying on *Rohrbaugh*, the district court found for Boyle.<sup>266</sup>

The Government appealed, arguing both that *Rohrbaugh* was a minority viewpoint, and that *Boyle* could be distinguished from that case.<sup>267</sup> As to the former argument, the Government pointed to *Kroll* and *Fleming* as representative of the majority view, and also cited *Ferrando*, *Millette*, and *Lillehei* in support of this position.<sup>268</sup> With regard to the latter argument, the Government con-

ties is a windfall to the government adding to the widespread belief in the unfair and arbitrary nature of much government procedure.

*Id.* (citation omitted).

260. 710 F.2d 1251 (7th Cir. 1983), *rev'd*, 105 S. Ct. 687 (1985).

261. 710 F.2d at 1251-52. The attorney hired by the taxpayer had practiced as an attorney for over 20 years, specializing in the real estate and probate fields. *Id.* at 1252.

262. *Id.* The attorney informed the taxpayer of the taxpayer's obligation to file a federal estate tax return during their discussions. *Id.*

263. *Id.* The court noted that the taxpayer "relied solely on his attorney for instruction and guidance." *Id.* The court also added that there was no evidence that the taxpayer had been untimely in providing his attorney with any information or records. *Id.*

264. *Id.* The taxpayer learned of the clerical error upon phoning his attorney to check on the progress of the return. *Id.* The error had been a result of an omission of the taxpayer's case from the attorney's personal calendar. *Id.*

265. *Id.* The additions totaled \$18,451.01, \$1,326.56 of which was interest. The taxpayer paid the penalty and filed a claim with the IRS for a refund. The IRS failed to act upon the refund request so the taxpayer brought this action in district court. *Id.*

266. *Id.* (citing *Rohrbaugh*, 611 F.2d 211). For a discussion of *Rohrbaugh*, see *supra* notes 221-47 and accompanying text.

267. 710 F.2d at 1253. For a discussion of the Government's arguments, see *infra* notes 268-69 and accompanying text.

268. *Id.* (citing *Kroll*, 547 F.2d 393; *Fleming*, 648 F.2d 1122; *Ferrando*, 245 F.2d 582; *Millette*, 594 F.2d 121; *Lillehei*, 638 F.2d 65). Each of these cases stand for the per se rule that reliance on counsel does not constitute reasonable cause within the meaning of Treas. Reg. § 6651(a)(1) (1985).

tended that Boyle had substantially more business experience than the taxpayer in *Rohrbaugh*, and thus should be held to a higher standard of ordinary business care.<sup>269</sup> On a final note, the Government argued that to permit the taxpayer to prevail would encourage executors to remain ignorant in their roles presumably for the purpose of avoiding possible delinquency penalties.<sup>270</sup>

In sustaining the trial judge's conclusion, the court had little difficulty dismissing the Government's arguments and allaying its fears.<sup>271</sup> In distinguishing the facts of *Kroll*-type cases, the court emphasized that Boyle never had actual knowledge of the due date of the return. The fact that Boyle had more business experience than the *Rohrbaugh* executrix was considered insignificant. Since Boyle did not have extensive tax return filing experience an inference that he should have known that the return had to have a filing deadline was not warranted.<sup>272</sup> Moreover, if holding the taxpayer to a higher standard of ordinary business care was justi-

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269. 710 F.2d at 1253. Recall that the taxpayer in *Rohrbaugh* was a high school graduate with no business experience and no previous experience as a personal representative of an estate. 611 F.2d at 212. In *Rohrbaugh*, the court made particular note of the taxpayer's inexperience and emphasized that she had no knowledge of the time requirements for the filing of a tax return. *Id.* Based on these facts, the taxpayer in *Rohrbaugh* met the first of the three necessary conditions, that she was unfamiliar with the tax law. *Id.* at 215. The court in *Rohrbaugh* also required the taxpayer to make full disclosure of all relevant information to her attorney and to exercise ordinary business care and prudence. *Id.* The *Rohrbaugh* court then concluded that, due to the taxpayer's constant contact with her attorney and the taxpayer's inexperience in business matters, she had exercised ordinary business care. *Id.* at 214.

In *Boyle*, the taxpayer had acted as an executor once before (20 years earlier) and had served as president of a corporation for approximately 30 years. 710 F.2d at 1252 n.2. Based on this experience, the Government contended that the taxpayer in *Boyle* was more experienced and thus distinguishable from the taxpayer in *Rohrbaugh*. *Id.* at 1253.

The Seventh Circuit in *Boyle* noted this factual distinction but held that it was insignificant. *Id.* The court emphasized that there was no evidence that an estate tax return was required when the taxpayer had previously served as an executor. *Id.* at 1252 n.2. Also, the court noted that, while the taxpayer had signed tax returns when acting as president of a corporation, accountants and auditors had been responsible for preparing and actually filing the returns. *Id.*

270. 710 F.2d at 1253. The court cited the Government's argument that "[a]n attorney may well avoid giving such information even where the executor does make an inquiry, since it would be not only in the estate's best interest, but also the attorney's own interest to keep the executor uninformed of this crucial matter." *Id.* The court in *Boyle* rejected this argument for two reasons. First, as was noted in *Rohrbaugh*, the executor can obtain an extension in order to obtain immunity and, therefore, does not need to remain ignorant. *Id.* (citing *Rohrbaugh*, 611 F.2d at 219). In addition, the court noted that reasonable cause implicates a case-by-case analysis and, therefore, it is "foolish" for an executor to rely on possible judicial relief. *Id.*

271. *Id.* at 1253-54.

272. For a discussion of the taxpayer's experience, see *supra* note 269.



fied in the circumstances, the court found that by hiring and maintaining close contact with competent counsel, any such standard had been met.<sup>273</sup> With regard to the contention that *Rohrbaugh* was a minority view and should be overruled, the court, through an analysis of the facts and language of the "majority" cases, demonstrated the consistency among them.<sup>274</sup> Of particular importance was Boyle's ignorance of the due date of the return and the prompt action he took upon learning of it, facts not present in *Kroll* or *Fleming*.<sup>275</sup> The court made clear that the Seventh Circuit had never decided that reliance on counsel was per se not reasonable cause, despite the Government's persistence in obtaining that holding.<sup>276</sup>

As to the Government's attack on *Rohrbaugh* as "bad law" potentially dangerous to future timely revenue collection, the court enunciated an enlightened response. First, it noted that *Rohrbaugh* adopted a case-by-case approach in applying any standards for determining "reasonable cause."<sup>277</sup> Thus, it would be unrealistic to assume executors would purposefully be dilatory under the belief *Rohrbaugh* would protect them from penalties. As support, the court noted that there had not been a "flood of lawsuits involving late filings of tax returns"<sup>278</sup> since *Rohrbaugh*.

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273. 710 F.2d at 1253 (in support of the finding that the taxpayer had exercised reasonable cause). The court stated that the taxpayer "hired competent counsel soon after his mother's death and cooperated fully with [the attorney]. Furthermore, [the taxpayer] maintained contact with his attorney and did not simply abandon the estate once he had delegated the legal functions." *Id.*

274. *Id.* (citing *Kroll*, 547 F.2d 393; *Fleming*, 648 F.2d 1122). The court distinguished *Boyle* in that the taxpayer in *Boyle* did not know the due date for filing of the return, while the taxpayers in *Kroll* and *Fleming* did know of that due date. *Id.* The court further distinguished the cases in that in both *Kroll* and *Fleming* the taxpayer was informed of the missed deadline but did not take timely or effective action to cure the problem. *Id.* at 1253. In *Boyle*, on the other hand, the taxpayer filed an effective return just one week after learning of the failure to file. The court stated that this demonstrated "ordinary business care and prudence," and that "any suggestion of willful neglect was negated." *Id.*

275. 710 F.2d at 1253.

276. *Id.* at 1254 (Coffey, J., concurring). Judge Coffey stated that "whether reasonable cause exists is, of course, primarily a question of fact to be determined by the trier of fact from all of the facts and circumstances in a particular case." *Id.* (citing *Estate of DiRezza v. Commissioner*, 78 T.C. 19 (1982) (citations omitted)).

277. 710 F.2d at 1253. For a further discussion of the applicable standards of reasonable cause, see *supra* note 270 and accompanying text.

278. 710 F.2d at 1254. The fear of an excessive number of law suits over belated returns was first addressed by the dissent in *Rohrbaugh*. 611 F.2d at 219 (Swygert, J., dissenting). The majority in *Rohrbaugh* listed a number of factors it felt would prevent this excessive number of suits. 611 F.2d at 219. The court stated that taxpayers who were intentionally delinquent were still not protected. *Id.* The court also cited embarrassment to attorneys and accountants upon late

The language and tenor of the concurring opinion is equally refreshing. There it is noted that whereas simple passivity will not permit a finding of "reasonable cause," it is unrealistic to expect executors to make specific inquiries of due dates or deadlines.<sup>279</sup> Clients ought to be able to expect professional counsel to perform the duties for which they were hired, and the concurring opinion adopts this position suggesting that codes of professional ethics impose such an obligation on them.<sup>280</sup>

Pursuing a contrary path in another strong dissent, the "personal, nondelegable duty" theory was again articulated.<sup>281</sup> The dissent questioned whether the majority had in fact sanctioned executor passivity, a viewpoint condemned by others.<sup>282</sup> Of particular concern seemed to be the nagging fear that negligent counsel will go unpunished if taxpayers continue to prevail.<sup>283</sup> The legitimacy of such a concern must be questioned. One might

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returns as a factor which would help keep the number of delinquent returns down. The court also noted that litigation over the reasonable cause issue can become quite expensive and that this would discourage belated filings. In addition, the court recognized that interest runs on the original tax from the date the return was due even if the taxpayer avoids the penalty. Finally, the court noted that the burden of proving reasonable cause is still upon the taxpayer. *Id.*

279. 710 F.2d at 1255 (Coffey, J., concurring). Judge Coffey states: "No decision of this court, or any other circuit court, has ever held that asking a single magically worded question (the exact due date) is the determining factor in cases such as this." *Id.* Judge Coffey also stated that it is "neither practical nor realistic to require a taxpayer to specifically inquire as to the exact filing date, to supervise his attorney's every move, or to, in essence, personally perform those tasks he has entrusted his professionally retained legal counsel to complete." *Id.*

280. *Id.* The concurrence noted that the Illinois Code of Professional Responsibility requires that the attorney file estate tax returns within the allotted time period. *Id.*

281. *Id.* at 1256 (Posner, J., dissenting).

282. *Id.* at 1257 (Posner, J., dissenting) (citing *Lammerts*, 456 F.2d 681 (2d Cir. 1972) ("simple passivity" could not excuse executor from relying on attorney or accountant)). The dissent agreed that if Boyle had asked the attorney when the estate tax return was due and the attorney misinformed him, then there might be reasonable cause. However, by not so inquiring, Boyle was deemed to be passive and to have failed to establish reasonable cause for the late filing. *Id.*

283. *Id.* at 1258 (Posner, J., dissenting). The dissent stated:

If [the taxpayer] were required to pay the penalty that the Internal Revenue Service assessed, he might well, as I have suggested, have a malpractice claim against his lawyer, whose admitted negligence was the primary cause of the late filing. Liability would thus come to rest on the person whose fault was primarily responsible for depriving the Internal Revenue Service of its due. In this way proper incentives would be created to avoid a persistent problem in the enforcement of the tax laws. Instead the court today adopts an approach that rewards both the active negligence of the lawyer and the passive negligence of his client.

*Id.*

respond with the inquiry, "Is it preferable to penalize the innocent taxpayer?" Interestingly the dissent hinted that it might have found "reasonable cause" if Boyle had asked counsel for a due date and was misinformed.<sup>284</sup> Presumably then the taxpayer would be relying on "expert advice," which if incorrect could provide the basis for reasonable cause. Such a position may be founded on quicksand. Can one realistically distinguish counsel's failure to file on time from providing an inaccurate due date? The practicalities dictate that counsel is retained to do the job correctly. Should the fact of whether his failure to meet that obligation stems from negligence in filing or negligence in researching a due date be determinative of sanctions to be imposed on the client? Attempts at such distinctions crystalized the need for a better working rule on the subject.

#### D. Boyle v. United States

The United States Supreme Court granted certiorari in *Boyle* to end the conflict among the circuits concerning whether the "attorney reliance" argument could shield executors from delinquency penalties.<sup>285</sup> There can be no misreading of the Court's intention to put the quietus on the issue by establishing the general bright line rule<sup>286</sup> that reliance on counsel does not constitute reasonable cause for tardy tax return filings.<sup>287</sup> Although retaining counsel to assist in estate administration is prudent, this

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284. See *id.* at 1257 (Posner, J., dissenting). The dissent stated that it did not believe that the taxpayer's constant contact with his attorney as to his progress was sufficient to satisfy a reasonable cause determination. *Id.* The dissent stated that "Boyle could not simply close his eyes and ears" as to the deadline and "still be found to have used 'ordinary care and prudence.'" *Id.* at 1258 (Posner, J., dissenting).

285. *United States v. Boyle*, 105 S. Ct. 687, 688 (1985).

286. See *id.* at 692. The Court stated that "[t]he time has come for a rule with as 'bright' a line as can be drawn consistent with the statute and implementing regulations." *Id.* (footnote omitted). The Supreme Court emphasized that fixed deadlines are essential if the Government is to oversee millions of taxpayers. The Court proceeded to state that, under a system of self-assessment in initial tax calculations, deadlines must be enforced by a "rigid standard" otherwise the Government would risk allowing a "lax attitude toward filing dates." *Id.*

287. *Id.* The *Boyle* Court emphasized that "Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline." *Id.* The hiring of an attorney is an exercise of "ordinary business care and prudence" as prescribed in the regulations. *Id.* (citing Treas. Reg. § 301.6651-1(c)(1) (1984)). However, the Court stressed that "ordinary business care" is not the determinative question in this case. *Id.*

The Court held that while it may be reasonable for a taxpayer who hires an attorney to expect the attorney to comply with the deadlines in filing the returns, this fact does not relieve the executor from his obligations under the statutes. *Id.* The Court stated that "Congress has charged the executor with an unambig-

in and of itself is not dispositive of the reasonable cause issue. The Court followed a *Ferrando* tack, stressing that it is the executor's duty to file the return, and that this obligation is not met by merely retaining counsel and assuming he will perform all the jobs (including filing returns) he was hired to do.<sup>288</sup>

Whereas the Court tacitly adopted the "nondelegable duty" theory it apparently rejected (or would not apply) a pure principal-agent rationale for imposing late-filing responsibility even though it did use principal-agent terminology.<sup>289</sup> This distinction seems important for without it "attorney reliance" could never constitute "reasonable cause" to the principal-taxpayer who would always be imputed with the agent-preparer's negligence. The Court recognized, however, that under certain circumstances following the advice of counsel can constitute reasonable cause for avoiding penalties. Such is the case if the advice is technical in nature, e.g., whether or not a return is due at all.<sup>290</sup> This appears to be an acceptance of the *Hatfried-Haywood* rationale, as applied in *McCouglan*, *Collino* and *Christ*.<sup>291</sup> But its application is limited to reliance on substantive advice. The Court was generally unwilling to extend the protection to executors fulfilling non-technical, procedural functions such as filing duties, as some of the circuit courts were wont to do.<sup>292</sup> In certain instances however, some protection would be afforded by the Court. Specifically, if an executor who was incapable of exercising ordinary care relied upon counsel, reasonable cause might be found. The Court pointed

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uous, precisely defined duty to file the return within nine months" and the taxpayer cannot pass this duty off to the attorney. *Id.* at 692-93.

288. For a discussion of relevant aspects of *Ferrando*, see *supra* notes 133-40 and accompanying text.

289. 105 S. Ct. at 693. The Court held that "when an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice." *Id.* (emphasis in original). The court reasoned that "[t]o require the taxpayer to challenge the attorney, . . . or to try to monitor counsel on the provisions of the Code . . . would nullify the very purpose of seeking the advice of a presumed expert in the first place." *Id.* (citing *Haywood Lumber*, 178 F.2d at 771).

290. *See id.*

291. *See Haywood*, 178 F.2d 769; *Hatfried*, 162 F.2d 628; *McCouglan*, 10 B.T.A. 958; *Collino*, 25 T.C. 1026; *Christ*, 54 T.C. 493. *Hatfried* and *Haywood* are the cases frequently cited for their use of the "attorney reliance" theory in excusing taxpayers from paying delinquency penalties. For a discussion of *Hatfried* and *Haywood*, see *supra* notes 84-122 and accompanying text.

292. *See, e.g., Rohrabough*, 611 F.2d 211 (no penalty where inexperienced taxpayer, unaware of time requirement for filing return, relied on attorney); *In re Fisk's Estate*, 203 F.2d 358 (taxpayer's reliance on attorney to file timely return constitutes reasonable cause); *Haywood*, 178 F.2d 769 (reliance on advice of counsel or expert accountant in good faith is reasonable cause).

out that the requisite incapacity would probably be a disability sufficient in itself to constitute reasonable cause for a delinquent filing, and as such, resort to a reliance on counsel theory would be unnecessary.<sup>293</sup> Nonetheless, the argument could be made. The underlying premise adopted by the Court is that a taxpayer should not be held accountable for circumstances beyond his control.<sup>294</sup>

Crucial to the pro-Government result reached by the Court is its view that no degree of tax expertise is required to know that tax returns have due dates.<sup>295</sup> Once cognizant of the necessity to file, the executor must affirmatively act to ascertain the due date of the return, and see that it is met.<sup>296</sup> These are basic executor duties for which the executor remains responsible even if he delegates their actual performance to another. Consequently, when the filing duty is not properly performed because of a delegate's error, it does not constitute reasonable cause and the executor remains liable.<sup>297</sup>

In his concurring opinion, Justice Brennan expressed his agreement with the view that ordinary care and prudence require some affirmative action to determine deadlines and see that they are met.<sup>298</sup> These executorial responsibilities cannot be delegated to counsel with impunity. However, picking up on some of

293. 105 S. Ct. at 692 n.6. The Court stated:

The principle underlying the IRS regulations and practices—that a taxpayer should not be penalized for circumstances beyond his control—already recognizes a range of exceptions which there is no reason for us to pass on today. This principle might well cover a filing default by a taxpayer who relied on an attorney or accountant because the taxpayer was, for some reason, incapable by objective standards of meeting the criteria of “ordinary business care and prudence.” In that situation, however, the disability itself could well be an excuse for a late filing.

*Id.*

294. *Id.*

295. *Id.* at 693. The Court held that “one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due.” *Id.* The Court emphasized that deadlines are “implied” in tax returns and that taxpayer reliance on attorneys “cannot function as a substitute for compliance with an unambiguous statute.” *Id.*

296. *Id.* The first duty of the personal representative of an estate is to identify and collect all of the decedent's assets and to determine the tax obligations of the estate. *Id.*

297. *Id.* at 693-94. The Court noted that “it requires no special training or effort to ascertain a deadline and make sure that it is met.” *Id.* at 693. In fact, many executors perform many of the probate functions themselves, without soliciting the aid of either an attorney or an accountant. Also, executors occasionally conduct probate proceedings without the assistance of counsel. *Id.*

298. *Id.* at 694 (Brennan, J., concurring).

the exceptions noted by the majority, Justice Brennan took care to stress the fact that only an "ordinary person" could be held to this standard.<sup>299</sup> The opinion suggests that an incompetent or infirm individual might not be able to meet the responsibilities of an executor. To the extent a disability renders an executor "physically and mentally [in]capable of knowing, remembering, and complying with a filing deadline," he should not be held to the usual standard of care.<sup>300</sup> Again, there is the strong flavor of exculpability for circumstances beyond the taxpayer's control.<sup>301</sup> Justice Brennan suggested that in such instances perhaps the statutory interest charge<sup>302</sup> on the late payment would be penalty enough, without imposition of the harsh costs of § 6651(a)(1).<sup>303</sup> The concurrence also noted that the bright line rule adopted by the Court will apply with equal effect to personal income tax returns; and although not stated, presumably will govern reasonable cause determinations based on attorney reliance theories for all other taxes as well.<sup>304</sup> Perhaps because of this broad sweep,

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299. *Id.* at 695 (Brennan, J., concurring). The concurrence noted: "The government itself has eschewed a bright line rule and committed itself to *necessarily* case-by-case decisionmaking. *Id.* The gravamen of IRS's exemptions seems to be that a taxpayer will not be penalized where he reasonably was *unable* to exercise ordinary business care and prudence." *Id.* (emphasis added).

300. *Id.* The concurrence stated that: "Although the overwhelming majority of taxpayers are fully capable of understanding and complying with the prescribed filing deadlines, exceptional cases necessarily will arise where taxpayers, by virtue of servility, mental retardation, or other causes, are understandably unable to attain society's norm." *Id.*

Because, however, the taxpayer in *Boyle* was fully capable of meeting the required standard of ordinary business care and prudence, the concurrence did not reach the question of the circumstances under which a taxpayer who presents evidence of his inability to comply with the required standard would be entitled to relief from the penalty. *Id.*

301. *See id.* at 694 (Brennan, J., concurring).

302. *See* I.R.C. § 6601(a) (1985). This section provides that interest shall be charged on any amount due that is not paid on or before the last date prescribed for payment. *Id.*

303. 105 S. Ct. at 694 (Brennan, J., concurring) (citing 26 U.S.C. §§ 6601(a), 6651(a)(1) (1985)). Section 6651(a)(1) provides for the "reasonable cause" exception to penalties for delinquent returns. *Id.* For a further discussion of § 6651(a)(1), see *supra* notes 7-27 and accompanying text.

304. 105 S. Ct. at 695 (Brennan, J., concurring). The Seventh Circuit has since cited this aspect of Justice Brennan's concurring opinion and held that relying on a bank to file a Form 5500-C annual return does not constitute reasonable cause for failure to file the return on time. *Alton OB-Gyn, Ltd. v. United States*, 57 A.F.T.R.2d (P.H.) 1279 (7th Cir. 1986). In *Alton*, the taxpayer established employee benefit plans and designated the First National Bank and Trust Company of Alton as the plans' trustee. *Id.* at 1280. In 1977, the taxpayer failed to timely file the required Form 5500-C Annual Return, paid the late filing penalty assessed by the Commissioner, and filed a suit for a refund. *Id.* On appeal to the Seventh Circuit, the taxpayer argued that its reliance on the bank

Justice Brennan felt compelled to emphasize that such a strict rule ought not to be blindly applied in every and all instances. As was noted, "efficiency should yield to other values in appropriate circumstances."<sup>305</sup>

One walks away from the *Boyle* decision with some uneasiness. On the one hand, the clear rule has been set: reliance on counsel will not constitute reasonable cause for a delinquent tax return filing. On the other hand, if the advice relied upon is that a return was not due at all, such advice is seemingly substantive in nature and provides a basis for reasonable cause, if and when the misadvice is discovered and a required return is ultimately filed.<sup>306</sup> Moreover, there may be certain instances where a taxpayer will be unable to comply with the standard, perhaps leading to more tempered outcomes. Cases of particular interest in this latter category may include situations where counsel erroneously advise taxpayers as to the due date of the return, and after following that advice delinquent returns result. The Court specifically noted the problem and the conflicting resolutions which have been provided by the courts, but eschewed the opportunity to decide the matter.<sup>307</sup> As stated by Justice Brennan in his concurring opinion, "the Court has expressly left this issue open for another day."<sup>308</sup>

#### IV. ROOM ON THE RANGE

##### A. Footnote Nine Incapacity

Has the Court left enough loose ends for taxpayers to tie together to form a net which will prevent their fall into the abyss of

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hired to administer the benefit plans to file the returns on time was reasonable, and that the Supreme Court's opinion in *Boyle* did not control because Form 5500-C was an informational return and no tax was due. *Id.* Citing to the concurrence in *Boyle*, which makes it clear that *Boyle* "will apply with full force to the personal income tax returns of every individual who receives an annual gross income of \$1,100," the Seventh Circuit held that "every individual is required to file a return without regard to whether any tax is due." *Id.* at 1280 (citing *Boyle*, 105 S. Ct. at 695).

305. 105 S. Ct. at 695 (Brennan, J., concurring). For a discussion of when reliance on counsel is justified, see *supra* note 290 and accompanying text.

306. See 105 S. Ct. at 693.

307. *Id.* at 693 n.9. The majority stated that "courts have differed over whether a taxpayer demonstrates 'reasonable cause' when, in reliance on advice of his accountant or attorney, the taxpayer files a return after the actual due date but within the time the advisor erroneously told him was available." *Id.* (citations omitted). However, the majority concluded, "We need not and do not address ourselves to this issue." *Id.*

308. *Id.* at 695 (Brennan, J., concurring).

non-reasonable cause? Seemingly so, at least to the extent it can be shown that the taxpayer is incapable of meeting established standards. Unfortunately the Court failed to identify what would constitute such a disability, and specifically retreated from answering such hypothetical questions.<sup>309</sup> Could an aged or infirm executor find protection under such a theory? If so, what exactly would have to be demonstrated to permit escape from the delinquency penalty on this account? Additionally, what would constitute the limits of the infirmity? Could a physical infirmity alone qualify, or would more be required? Similarly, could a grief-stricken widow or widower arguing mental paralysis as a result of her or his loss without any corresponding physical impairment become eligible for relief? In any event, it seems likely that the executor would have to show, at a minimum, that the infirmity rendered him incapable of exercising the care normally expected of an executor. The prospects of succeeding under this theory appear limited.<sup>310</sup>

Perhaps the more interesting attempt to show reasonable cause will come from a "legal infirmity" argument: an inability to meet the established standard because of misinformation supplied by counsel. It is well accepted that if the reliance on counsel speaks to a substantive issue and result in a non-filing (or late filing upon discovery of counsel's error), reasonable cause will be found.<sup>311</sup> This in a sense can be viewed as an acceptable "legal

309. *Boyle*, 105 S. Ct. at 692 n.6. The Court did, however, refer to some situations which the IRS considers to give rise to reasonable cause for delinquent returns. *Id.* at 689 n.1. Those include: unavoidable postal delays, timely filing with the wrong IRS office, reliance by the taxpayer on misinformation given by an IRS officer or employee, death or serious illness of the taxpayer or an immediate family member, unavoidable absence of the taxpayer, destruction of the taxpayer's records or place of business by casualty, failure of the IRS to furnish the taxpayer with necessary forms, and the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit to an IRS office in an attempt to secure information in the preparation of a return. *Id.* (citing Internal Revenue Manual (CCH) § 4350, (24), ¶ 22-2(2) (1980)). Additionally, Justice Brennan cited "incompetence" and "infirmity" as possible qualifying disabilities, but did not elaborate further on this point. *Id.* at 694 (Brennan, J., concurring).

310. Despite this caution, the district court in *Brown v. United States* excused a late filing and abated the penalty. 57 A.F.T.R.2d (P-H) 143,301 (M.D. Tenn. 1985). In *Brown*, the federal estate tax return was filed late because the attorney retained by the administrator to handle estate matters was hospitalized shortly before the return was due. The court found that *Boyle* did not control, but instead that the administrator was incapable of meeting the filing deadline and was thus excused under a "footnote nine" rationale. *Id.* at 143,304.

311. The *Boyle* Court, for example, cites various authorities in tacitly accepting this position. 105 S. Ct. at 693 (citing *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944) (remand to determine if failure to file was due to reasonable



infirmity.” In footnote nine, the *Boyle* Court alluded to another possible “legal infirmity”: a delinquent filing resulting from counsel’s misrepresentation of the due date of the return.<sup>312</sup> In specifically refusing to decide this issue, the Court left unanswered whether such a situation would qualify as reliance on substantive advice (information regarding a statutory requirement—the filing due date) and thereby constitute reasonable cause.<sup>313</sup> To date, executors who have pressed forward on this point have received mixed reactions from the courts.<sup>314</sup>

The tax court, for example, has been somewhat sympathetic to the misinformed executor. In *Estate of Bradley v. Commissioner*,<sup>315</sup> the court found reasonable cause for the executor who had filed a delinquent estate tax return within the time advised by his accountant but after the due date prescribed by the statute.<sup>316</sup> The Government argued to impose the penalty pursuant to the *Ferrando* nondelegable duty theory.<sup>317</sup> This contention was dismissed on the ground that the taxpayer did not delegate his filing

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cause); *Commissioner v. American Assoc. of Eng'rs Employment, Inc.*, 204 F.2d 19 (1st Cir. 1953) (taxpayer not liable for late filing penalty when acting on advice of experienced tax attorney that taxpayer was exempt corporation); *Haywood Lumber*, 178 F.2d 769 (corporate taxpayer who selects competent tax expert, supplies expert with all necessary information, and requests expert to prepare necessary returns has met reasonable cause standard); *Hatfried*, 162 F.2d 628 (taxpayer who makes full disclosure to accountant of all relevant facts and relies on advice of accountant as to whether to file meets reasonable cause standard)).

312. 105 S. Ct. at 693 n.9. For a further discussion of the importance of this footnote, see *supra* note 307 and accompanying text.

313. 105 S. Ct. at 693 n.9. The Court stated that “[w]e need not and do not address ourselves to this issue.” *Id.*

314. Compare *Sanderling, Inc. v. Commissioner*, 571 F.2d 174, 178-79 (3d Cir. 1978) (court found reasonable cause where taxpayer filed return after deadline but within time advisor erroneously informed him was available) and *Estate of Bradley v. Commissioner*, 33 T.C.M. (CCH) 70, 72-73 (1974) (court found reasonable cause for executor who filed delinquent tax within time advised by accountant but after statutory deadline), *aff'd*, 511 F.2d 527 (6th Cir. 1975) with *Smith v. United States*, 702 F.2d 741, 742 (1st Cir. 1983) (no reasonable cause where executor files after statutory deadline, even though filed within time advised by expert).

315. 33 T.C.M. (CCH) 70 (1974), *aff'd*, 511 F.2d 527 (6th Cir. 1975).

316. 33 T.C.M. (CCH) at 72. The taxpayer, an attorney, asked his accountant when the federal estate tax return was due. *Id.* at 70. His accountant mistakenly thought the taxpayer had inquired when the Kentucky state inheritance tax return was due and the accountant incorrectly informed him the return was due 18 months from the death of the taxpayer. *Id.* The federal return, actually due April 30, 1970, was delivered by the accountant to the taxpayer on May 28, 1970. The taxpayer mailed the return to the IRS the day he received it. *Id.* at 70-71.

317. *Id.* at 73. For a discussion of the *Ferrando* nondelegable duty theory, see *supra* notes 133-42 and accompanying text.

responsibility but rather sought advice on how to properly fulfill his duties. The court said:

To sustain respondent's argument would require a holding that an executor may rely upon the advice of an expert on substantive tax law questions but, as matter of law, may not do so with respect to the requirements of the law as to the due date of tax returns—that he must research that question for himself. We decline to so hold. We fail to see a significant distinction between the reasonableness of a failure to file at all and the reasonableness of a failure to file on time, where in both circumstances the taxpayer has relied on the advice of competent counsel. As applied to the facts of this case, we think respondent's argument lacks merit.<sup>318</sup>

After reviewing the overall record, the court had little difficulty concluding that the taxpayer had shown reasonable cause for filing late.<sup>319</sup>

Subsequently, in *Estate of DiPalma*<sup>320</sup> the tax court again abated a delinquency penalty because the taxpayer had erroneously relied on the advice of counsel regarding the due date of an estate tax return.<sup>321</sup> In *DiPalma*, the executrix was led by counsel to believe that the return would not be due until after the legal disputes among the estate beneficiaries were settled.<sup>322</sup> The court, citing *Bradley*, concluded that an inexperienced executrix "was justified in relying on her belief"<sup>323</sup> as to when the return was due.<sup>324</sup> It also noted that the dispositive factor was not the presence of estate litigation, but rather the actual belief that the litigation postponed the due date of the return.<sup>325</sup> This point enabled the court to distinguish the case from *Duttenhofer*.<sup>326</sup>

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318. 33 T.C.M. (CCH) at 73.

319. *Id.* The court stated that "taking into account all the facts of record, we find that Arnold, as co-executor of the decedent's estate, sought to ascertain and discharge his responsibilities with ordinary business care and prudence." *Id.* (citing *Lammerts*, 54 T.C. at 445-47).

320. 71 T.C. 324 (1978).

321. *Id.* at 327.

322. *Id.* at 325-26. The court observed: "The executrix did not sit supinely by and leave everything to [her attorney,] she made inquiry of him. She was led to believe by the attorney for the estate that the pending dispute . . . justified the delay in the filing of the return." *Id.* at 327 (citations omitted).

323. *Id.* (citing *Bradley*, 33 T.C.M. at 73).

324. *Id.* at 326.

325. *Id.* at 327 n.3.

326. *Id.* (citing *Duttenhofer*, 49 T.C. at 206-07). In *Duttenhofer*, the court did

Despite the tax court's belief that the incorrect due date problem should be given the same treatment accorded taxpayers misinformed as to whether or not a return is due,<sup>327</sup> the more recent trend has been to the contrary. Although penalizing an executor who in good faith follows the directives and advice (albeit erroneous) of putatively qualified counsel is a bitter pill to swallow, some courts have, nonetheless, prescribed this medicine. Not surprisingly, the Eighth Circuit has been in the vanguard of this movement. In *Smith v. United States*<sup>328</sup> and *Estate of Kerber v. United States*,<sup>329</sup> attorneys incorrectly advised the taxpayers that the estate tax returns were due one year instead of nine months from the decedents' deaths.<sup>330</sup> In both instances the court found the teaching of *Lillehei* controlling, and held that the taxpayers had failed to distinguish themselves from the facts of that case.<sup>331</sup> The nondelegability of the duty to file a timely return carried the day for the Government.

The same result, on somewhat different facts, came in *Sarto v. United States*.<sup>332</sup> In *Sarto*, the executors were led by counsel to believe that an indefinite extension of time to file the estate tax return had been obtained.<sup>333</sup> Taxpayer-plaintiffs argued that because of their attorney's misrepresentation they had no actual notice of a due date and therefore were unable to file a timely return.<sup>334</sup> Although moved by the novelty of the situation, the

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not consider the presence of litigation sufficient to support a finding of reasonable cause by the taxpayer. 49 T.C. at 206-07. However, the court in *DiPalma* emphasized that there was "no evidence [in *Duttenhofer*] that the existence of such litigation as a possible reason for delay in the filing of the estate tax return was communicated to the executors by the attorney for the estate." 71 T.C. at 327 n.3. It is on this point that the court in *DiPalma* distinguished *Duttenhofer*. See *id.* For a further discussion of *Duttenhofer*, see *supra* notes 153-67 and accompanying text.

327. See *Bradley*, 33 T.C.M. (CCH) 70; *DiPalma*, 71 T.C. 324. See also *Estate of Paxton*, T.C.M. (P-H) ¶ 86.51 (post-*Boyle* case where counsel's advice that no return was necessary constituted reasonable cause).

328. 702 F.2d 741 (8th Cir. 1983).

329. 717 F.2d 454 (8th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984).

330. See *Kerber*, 717 F.2d at 456; *Smith*, 702 F.2d at 743.

331. See *Kerber*, 717 F.2d at 455 (citing *Lillehei*, 638 F.2d 65); *Smith*, 702 F.2d at 742. In *Kerber*, the court held that "reliance on the advice of professionals did not provide reasonable cause to miss the deadline." 717 F.2d at 455. Similarly, in *Smith*, the court held that "[the taxpayer's] reliance on his attorney did not constitute reasonable cause for [the taxpayer's] failure to file the estate tax return within the nine month deadline." 702 F.2d at 743. For a discussion of *Lillehei*, see *supra* notes 184-87 and accompanying text.

332. 563 F. Supp. 476 (N.D. Cal. 1983).

333. *Id.* at 477.

334. *Id.* at 478.

court nonetheless felt that there was insufficient justification to depart from the *Ferrando* nondelegable duty principle.<sup>335</sup> The court was unable to justify abating a penalty for an executor who was actively misled by counsel as distinguished from an executor who passively sat by and ended up filing late because of counsel's neglect. Particularly vexing to the court was the thought that if the plaintiffs prevailed, merely negligent attorneys could compound their errors by actively deceiving clients as to due dates to provide a means to avoid delinquency penalties.<sup>336</sup> Although the court may be unfairly assuming reckless behavior by tax advisors, this does not detract from the underlying basis denying "reasonable cause" in such instances. Executors will have to live with the hard line view which places the onus of filing upon them.

This particular issue may ultimately be decided by the Supreme Court,<sup>337</sup> but even if it is one cannot be too optimistic for a pro-taxpayer result. It seems unrealistic to expect so soon a decision which could erode the strong "taxpayer duty" created in *Boyle*. To allow taxpayers to avoid penalties because counsel misinformed them of the due date of the return may, as suggested in *Sarto*, be too easy a path for tax delinquents to take to escape penalty. In all likelihood the footnote nine dilemma will be resolved at the circuit court level. Given the current climate, resolution of the dilemma probably will not emasculate the penalty statute recently given new strength by *Boyle*.

#### B. *Right Place, Wrong Pot?*

Have executors relying on counsel been unduly caught in the revenue-raising net? Can there be much doubt that *Boyle*, decided on the heels of a massive tax act designed to reduce the federal deficit,<sup>338</sup> was to some degree influenced by the prevailing fiscal crisis? To the extent dilatory taxpayers are a threat, or at least a

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335. *Id.* For a discussion of *Ferrando*, see *supra* notes 133-42 and accompanying text.

336. 563 F. Supp. at 478. The court stated:

If a taxpayer who had been affirmatively misled by his attorney regarding the date on which his return was due could escape liability while a taxpayer who was passively negligent could not, the ultimate result would be that attorneys who had engaged in active deceit would escape liability while attorneys who were merely guilty of neglect would not.

*Id.*

337. The Supreme Court has already twice passed up, both directly and indirectly, the opportunity to decide this issue. See *Boyle*, 105 S. Ct. 687 (1985); *Kerber*, 465 U.S. 1067 (1984), *denying cert. to* 717 F.2d 454 (8th Cir. 1983).

338. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

bother, to the federal fisc<sup>339</sup> there is something to be said for adopting a strong posture against the "attorney reliance constitutes reasonable cause" argument. This is especially true insofar as the broadly based and revenue-intensive income tax is concerned. Ironically, the hard line for delinquencies was drawn in an estate tax and not an income tax setting. The estate tax does not touch or concern most taxpayers<sup>340</sup> and is of minor revenue significance in the overall federal tax picture.<sup>341</sup> By not finding "reasonable cause" in a situation where the taxpayer was able to make out a strong case, the Supreme Court may have intended to serve notice that escape from filing delinquency penalties will be strictly limited.<sup>342</sup>

One cannot help but wonder whether the *Boyle* Court has used an elephant gun to shoot a pesky ant. There is no gainsaying the fact that delinquent returns ought not to be tolerated; and to the extent penalties minimize delinquencies and help defray the cost of investigating and processing returns of late filers, so much the better. But Congress saw fit to except from penalties late returns resulting from "reasonable cause," a term officially interpreted to mean "the exercise of ordinary care and prudence."<sup>343</sup> Extraordinary actions were not required, just plain ordinary care and prudence.<sup>344</sup>

As suggested in *Rohrbaugh*, reasonable cause should be de-

339. See *Boyle*, 105 S. Ct. at 693. In *Boyle*, the Court stated: "The government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filings standards." *Id.* at 692.

340. Although to be phased in from the current \$400,000 figure, by 1987 the transfer taxes will only be assessed on values in excess of \$600,000, and otherwise taxable transactions below that amount will not have to be reported on a return. See I.R.C. §§ 2010(a)-(b), 2505(a)-(b) (1985) (establishing unified credit against estate and gift taxes, which is the taxable transfer equivalent of the dollar amounts identified above); *Id.* § 6018(a).

341. The transfer taxes consistently raise less than two percent of the Government's total annual revenue. See generally Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 265-73 (1983).

342. The tax court has seemingly taken this view. See *Freeland v. Commissioner*, 51 T.C.M. (CCH) 253, 256 (1986) (court faithfully cited *Boyle* as authority for not abating delinquency penalty assessed on income tax return where reliance on counsel was presented as basis for reasonable cause).

343. See 26 C.F.R. § 301.6651(c)(1) (1984). The regulation states that: "reasonable cause exists if the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." *Id.*

344. See, e.g., *Sanderling, Inc. v. Commissioner*, 571 F.2d 174, 179 (3d Cir. 1978). The court emphasized that "it is important to observe the statute uses the words 'reasonable cause' not extraordinary circumstances." *Id.* (citing 26 C.F.R. § 301.6651-1(c) (1984)).

terminated with reference to the type of tax involved,<sup>345</sup> something apparently absent in the *Boyle* calculus. Given the fact that the estate tax and any potential delinquency penalties will affect only a handful of taxpayers, it is not surprising that most executors are unfamiliar with, if not totally unaware of, the estate tax requirements. There is no estate tax equivalent of the notification effort put forth by the Government to ensure timely filings of income tax returns. Practically speaking, executors are left with no alternative other than to seek out counsel and obtain the technical assistance to fulfill their obligations. But theory says this may be enough. The Court has drawn a sharp distinction between ascertaining one's duties on the one hand and seeing that they are performed on the other.<sup>346</sup> Whereas there might be relief from penalty when misinformed by counsel with respect to the former, it now is clear that "malassistance" will not constitute reasonable cause with respect to the latter.<sup>347</sup> Once an executor becomes aware that a return is due, he basically becomes a guarantor of its being timely filed.

Another unexplored aspect of the problem questions whether the status of the executor—lay or professional—should be a factor worthy of consideration.<sup>348</sup> Undeniably a professional executor, or for that matter any executor charging the estate for his services, ought to be treated as a guarantor of performance. Conversely, the lay executor who renders his services on a gratuitous basis perhaps should not be expected nor required to perform at the same level. It seems quite reasonable, as suggested in *Engineers Employment*,<sup>349</sup> for the lay executor to rely almost exclusively on counsel, who is a paid professional, to see that all the necessary tasks are performed. To do otherwise in a way creates a higher standard of care for the uninformed lay executor than his professional counterpart. The lay executor must operate on a level beyond his accepted capabilities, while the professional need

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345. 611 F.2d at 214. The *Rohrbaugh* court held that "on the matter of reasonable cause, we think the type of tax would have a bearing on the matter of ordinary care and prudence." *Id.* For a further discussion of *Rohrbaugh*, see *supra* notes 215-47 and accompanying text.

346. See *Boyle*, 105 S. Ct. at 693.

347. *Id.*

348. See *Estate of Cox v. United States*, 86-2 U.S. Tax Cas. (CCH) ¶ 9595. In *Cox*, the district court followed *Boyle* to impose a delinquency penalty but specifically noted that "a professional executor should be held to a stricter standard than a mere layman . . ." *Id.*

349. See *Engineers Employment*, 204 F.2d at 21. For a further discussion of this case, see *supra* notes 201-205 and accompanying text.

only perform within his recognized ability. Consequently, the lay executor is forced to exercise extraordinary care; the professional or knowledgeable executor, only ordinary care. If the lay executor cannot rely on his expert to do the job, then the inexperienced, unsophisticated executor is put at a disadvantage. Surely such a situation is unreasonable.

Although "fee versus free" may be a relevant issue, it seems the gravamen of the problem sits not with the executors, but with the advisors. Through negligence and ignorance, counselors have created the issue with which their client-executors have been forced to wrestle. The Government should consider shifting its attack by imposing sanctions upon the attorneys, accountants, and enrolled agents,<sup>350</sup> who are the true source of the delinquencies. This seems a more appropriate approach to the problem since it is unlikely that a lay executor will serve in that capacity more than once, whereas advisors may well continue to provide improper assistance numerous times into the future. It would not be the first instance in which the Government has taken a step in this direction.<sup>351</sup>

It should not go unnoticed that *Boyle* may have unleashed a damaging blow to all future claims for penalty abatements, regardless of the basis for the reasonable cause asserted. Although the opinion speaks to the attorney reliance issue, its tenor suggests that only items beyond the taxpayer's control that prevent a timely return from being filed can constitute reasonable cause.<sup>352</sup> In his concurring opinion, Justice Brennan specifically referred to the taxpayer's "ability" versus "inability" to exercise ordinary care as the yardstick for determining "reasonable cause."<sup>353</sup> This clearly shifts the focus of the investigation and analysis. What had originally been a burden of showing the "exercise of ordinary business care and prudence," has been altered. Now, taxpayers apparently must demonstrate some incapacity which prevents

350. See 31 C.F.R. § 10.3(a)-(c) (1985). Attorneys and accountants can become authorized to practice before the IRS by merely declaring qualification in their respective profession. *Id.* § 10.3(a)-(b). Non-attorneys or accountants can become qualified to practice before the IRS by enrolling as agents. *Id.* § 10.3(c).

351. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(b)(1), 90 Stat. 1689 (1976) (codified at IRC §§ 6694-96, 7407 (1985)). This Act created I.R.C. §§ 6694 through 6696 and § 7407, which impose sanctions on "income tax preparers." The sanctions may take the form of fines or injunctions against preparers from committing further violations. See I.R.C. § 7407 (1985).

352. See *Boyle*, 105 S. Ct. at 693. For a further discussion of *Boyle*, see *supra* notes 285-337 and accompanying text.

353. See *Boyle*, 105 S. Ct. at 694 (Brennan, J., concurring). For a further discussion of *Boyle*, see *supra* notes 285-337 and accompanying text.

them from exercising that requisite care. Merely showing they exercised that necessary degree of care will be insufficient. The ramifications of this movement may well overshadow any immediate effect that *Boyle* has on misinformed executors. The Court may be signaling the requirement of a "death or dialysis" excuse as a prerequisite to excusing future taxpayers from the delinquency filing penalty.

It can be counter-argued that the *Boyle* decision is much ado over very little. Executors have a remedy and therefore are not left with the ultimate responsibility of paying the penalty bill.<sup>354</sup> Undoubtedly, the executor will have a cause of action against the negligent attorney,<sup>355</sup> but malpractice suits are at best a secondary remedy. Bringing the suit does not guarantee its successful conclusion. Moreover, there may be additional unrecoverable costs awaiting the injured executor. Finally, the delay in receipt of the fruits of victory could unduly tie up the estate and needlessly prevent closing, thereby causing additional expense. Would such concerns force the executor to at least consider settling for less than a full recovery? If so, the estate will ultimately bear part of the cost of counsel's failings. And if a victory is had, additional governmental insult will probably arise when the executor discovers that although the payment of the penalty is not tax deductible,<sup>356</sup> receipt of the recovery may very well be includible

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354. Although the penalty is technically charged to the executor, it will ultimately be borne by the estate, and derivatively by the beneficiaries thereof. The beneficiaries could seek to hold the executor liable under a breach of duty theory. It is conceivable that the "attorney reliance" defense that failed the executor on the federal penalty issue could similarly prove insufficient to provide insulation from liability on the local level. The executor would then in turn have to seek reimbursement from erring advisor.

355. See *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 413 N.E.2d 47 (1980). In *Sorenson*, a civil action, the court had no difficulty in finding the defendant attorney liable for malpractice for his negligence in failing to timely file an estate tax return on behalf of the plaintiff. *Id.* at 377, 413 N.E.2d at 56. A similar result was had in *Cameron v. Montgomery*, 225 N.W.2d 154 (Iowa 1975). See also *Smith v. United States*, 702 F.2d 741, 742 n.2 (1983) (taxpayer's attorney reimbursed estate for amount of penalty); *In re Estate of Remsen*, 415 N.Y.S.2d 370, 99 Misc. 2d 92 (1979) (estate reimbursed for penalty).

356. Generally, only necessary administrative expenses of the estate are deductible. Penalties clearly do not fall into any of the acceptable categories of necessary administrative expenses. See I.R.C. § 2053 (1985); 26 C.F.R. 20.2053-3(c), (d) (1986). With respect to the issue of deductibility of penalties for income tax purposes, see I.R.C. 162(f) (1985) (not deductible as business expense); I.R.C. 275 (1985) (denying deduction for the payment of estate and gift taxes themselves). See also Taggart, *Fines, Penalties, Bribes and Damage Payments*, 25 TAX L. REV. 611 (1970) (discussing consequences of late filing by taxpayer); Tyler, *Disallowance of Deductions on Public Policy Ground*, 20 TAX L. REV. 665 (1965) (disallowance of deductions by IRS which are allowable by statute).



in income.<sup>357</sup> The thought of making the executor whole is legally sound, but in practice it has a hollow ring.

In sum, it is suggested that *Boyle* violates the spirit of fairplay, especially when applied to lay executors. These executors, usually unaware of sophisticated transfer tax laws, will in a sense be required to monitor the activities of advisors who have been accepted or certified as being qualified to perform the services they are hired to do. To hold that "passivity" is not an exercise of ordinary care is understandable, but to veritibly require the executor to actively investigate the progress of counsel ignores practicality and may go beyond reason. Viewed from this perspective, the Court's adoption of the stance that good faith reliance on counsel does not constitute reasonable cause can be seen, at least in the case of inexperienced executors, as imposing an unfair burden on a few, while attempting to resolve the problem for many. The voluntary compliance tax system has lost a good part of its pliancy.

## V. CONCLUSION

In deciding *Boyle*, the Supreme Court made clear that merely relying on counsel to file tax returns will not constitute "reasonable cause" to abate penalties imposed on delinquent returns. Although the factual setting involved an estate tax, the holding will undoubtedly extend to other taxes as well. Whereas the need to protect revenue in these fiscally troubled times may well be a laudable pursuit, it has perhaps been advanced at the expense of fairness to certain taxpayers. Particularly injusticed are innocent executors who have followed what most would consider a prudent path by hiring putative experts to assure that the Government

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357. See *Clark v. Commissioner*, 40 B.T.A. 333 (1939). In *Clark*, the court held that the money paid to a taxpayer by an accountant to compensate the taxpayer for extra taxes paid by him because of the accountant's error was not includible in income. *Id.* The Commissioner issued a non-acquiescence on this matter. See 1939-2 C.B. 2, 4. Subsequently, in a revenue ruling, the Commissioner withdrew the non-acquiescence and agreed that the recovery of an overpayment of tax from a tax advisor because of that advisor's error is not includible in income. See Rev. Rul. 57-47, 1957-1 C.B. 23. However, the ruling further held that the recovery of interest and the fee paid the advisor (to the extent previously taken as a deduction) is includible in income. This position has recently been sustained by the IRS in a letter ruling. See Private Letter Ruling 8447076 (1984). However, in Private Letter Ruling 7749029 (1977), the IRS specifically distinguished a recovery of taxes from a recovery of "additions to the tax" from an advisor. In so doing, the letter ruling concluded that the latter was includible in the taxpayer's income. Although letter rulings have no precedential value, they do at a minimum indicate the Service's thinking on the matter, and to that extent merit consideration. See I.R.C. § 6110(j)(3) (1985).

gets it due. But the Government seems to want more. Executors are being considered guarantors of counsel's performance; and if counsel fails, the executor will be called upon to pay. Although the Government has received substantial support from the *Boyle* decision, there still seems to be some room for taxpayers to fashion winning arguments when their reliance on counsel is the cause of a delinquent return. Only future judicial response to these arguments will tell whether this issue will continue to stew or has come to full boil and is to be relegated to the back burner.

